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IN THE

Supreme Court of the United States

CONCORD BOAT CORPORATION, *et al.*,
Petitioners,

v.

BRUNSWICK CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether continuing to hold acquired assets that tend to create monopoly power is a continuing violation of the Clayton Act that restarts the statute of limitations period in Clayton Act § 4B, 15 U.S.C. § 15b?

2. Whether an incentive contract that is a de facto exclusive dealing arrangement is not anticompetitive as a matter of law merely because certain customers forgo the incentives, even though most customers abide by the agreement and the anticompetitive effects on the market as a whole are substantial?

3. Whether dominant market share of 78% creates a jury question with regard to market power?

4. Whether a monopolist who enters into a contract in restraint of trade, explicitly designed to raise entry barriers for its rivals and to foreclose a substantial share of the market, is immunized from antitrust liability so long as the monopolist prices its products above cost?

5. Whether expert testimony based on a valid and appropriate methodology can be excluded under this Court's holding in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993), based on the expert's consideration of the facts of the case?

PARTIES AND CORPORATE DISCLOSURES

Albemarle Boats, Incorporated
Armada Manufacturing Company, Inc.
Baha Cruisers/FRP Industries, Inc.
Brunswick Corporation
Campion Marine, Inc.
Caravelle Boats, Inc.
Century Craft Industries, Ltd., f/k/a Vanguard Industries
Concord Boat Corporation
G.W. Invader
Galaxie Boat Works, Inc.
Harbour Ventures, Inc. d/b/a Avenger Marine
Harris Kayot, Inc.
Independent Boat Builders, Inc.
KCS International Inc. d/b/a Cruisers Division of KCS International Inc.and d/b/a Shamrock Division of KCS International Inc.
Malibu Boats West
Mariah Boats, Inc.
Marine Manufacturing Corporation
Maverick Boat Co., Inc.
Mirage Manufacturing, LLC
Palm Beach Marinecraft, Inc.
Play Time Mfg. by Ohio Marine Distr., Inc.
Powerquest Boats, Inc.
Sea Arrow Marine, Inc.
Silverton Marine Corporation
Thompson Marine Products, Inc.
Weeres Industries Corporation

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Marine Manufacturing Corporation, Palm Beach Marinecraft, Inc., and Weeres Industries Corporation disclose that Clearwater Marine Inc. is their parent corporation. There are no parent corporations or publicly held corporations owning greater than ten percent of the stock of other petitioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Concord Boat Corporation *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals in this matter is reported at 207 F.3d 1039. Appendix to the Petition for Certiorari ("Pet. App.") 1a-46a. The court of appeals order denying rehearing and rehearing en banc is not reported. *Id.* at 85a. The opinion of the United States District Court for the Eastern District of Arkansas denying respondent's motion for a new trial after a jury verdict in favor of petitioners is reported at 21 F. Supp. 2d 923. *Id.* at 47a-84a.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2000, and the order denying rehearing and rehearing en banc was entered on June 13, 2000. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTES INVOLVED IN THE CASE

The statutes at issue in the case are sections 1 and 2 of the Sherman Act and sections 4B and 7 of the Clayton Act, 15 U.S.C. §§ 1, 2, 15b, and 18. The texts of these statutes are reproduced in the Appendix. Pet. App. 86a-89a.

STATEMENT OF THE CASE

I. INTRODUCTION.

Following a ten-week trial, a jury in Little Rock, Arkansas, unanimously concluded that Brunswick Corporation had violated the antitrust laws in connection with its domination

of the market for stern drive and inboard marine engines. The jury found Brunswick liable under three separate antitrust theories and returned a verdict in favor of the boat builder plaintiffs for $44,371,761. The district court denied Brunswick's post-trial motions.

On March 24, 2000, the Eighth Circuit reversed the district court. In reaching that outcome, the court of appeals disregarded controlling standards, issued multiple l gal rulings that conflict with the precedent of this Court and other circuits, and improperly granted judgment on all three antitrust claims in favor of Brunswick.

II. FACTS AND PROCEEDINGS.

A. Background.

The relevant market at issue in this dispute, as found by the jury, consists of stern drive and inboard marine engines in the United States and Canada (hereinafter, the "stern drive market"). In the early 1980s, Brunswick was the leading seller of stern drive engines largely because of a patent license that enabled it to build a modern stern drive engine. In the mid-1980s, however, several events began to alter the competitive landscape and threatened Brunswick's technology-based dominance.

First, in 1985, Brunswick's patent license expired and its largest domestic competitor, Outboard Marine Corporation ("OMC"), promptly introduced a new modern stern drive engine known as the Cobra. Second, Brunswick learned that Bayliner, the world's largest boat manufacturer, was developing its own low-cost stern drive engine. Third, in 1986, Brunswick, OMC, and Volvo Penta of the Americas, Inc. ("Volvo") were each seeking to win supply contracts for the two largest independent stern drive engine buyers, Bayliner and Sea Ray Boats – two engine buyers that collectively represented approximately 40% of the market and had buying power that historically had lowered engine prices for all purchasers. In June 1986, OMC prevailed in this competitive

bidding process and Bayliner agreed to purchase fixed quantities of OMC's new Cobra engine for three years, largely satisfying Bayliner's stern drive needs. At the same time, Brunswick was in danger of losing Sea Ray's business to OMC.

Recognizing these previously unencountered competitive challenges, in 1986 Brunswick embarked on a multi-pronged anticompetitive strategy with the express intent to "weaken competitors" and "reduce available market."

B. Brunswick's Actions.

1. Acquisitions.

In December 1986, Brunswick purchased Bayliner and Sea Ray in order to recapture the significant market share that had been lost in the competitive bidding process, to remove the disruptive influence exerted by these boat companies on pricing, and, in the words of Brunswick's Chief Executive Officer, to avert a "price war" from emerging competition.

Following the acquisitions, the stern drive sellers other than Brunswick – OMC, Volvo, and Yamaha (as of 1988) – could no longer hope to sell their stern drive engines to Bayliner (following expiration of the OMC three-year contract) or Sea Ray. Forty percent of the market was thus foreclosed. With this development, the other stern drive manufacturers were relegated to competing for portions of the remaining "independent" stern drive boat manufacturer business.

Following these initial acquisitions, Brunswick's strategic pattern of both horizontal and vertical purchases continued unabated. Between 1986 and 1996, Brunswick acquired Baja (a boat company), Kiekhaefer (an engine company), BMW Diesel (an engine company), and Boston Whaler (a boat company). The common feature of these acquisitions was that each purchase either eliminated an actual or potential engine selling rival or removed an engine purchaser. In each

instance, competition declined while Brunswick's dominance was strengthened.

From the initial acquisition date in December 1986 through the balance of the decade, Brunswick's results matched its strategic design. In particular, Brunswick's stern drive market share rebounded from its low of 53% (just prior to the acquisitions) to approximately 70%. Second, as Brunswick's market share and market power increased, so did its stern drive engine prices, for the downward pricing pressure previously exerted by Bayliner and Sea Ray had been extinguished. Third, Brunswick terminated Bayliner's development of a low-cost stern drive engine, and the prospect for a new price-constraining influence was removed.

2. Market Share Programs.

The second prong of Brunswick's strategy was introduced in the form of "market share" engine supply contracts. The market foreclosure begun with the 1986 acquisitions was fortified through these contracts that targeted, and sought to constrict, the "independent" boat builder market (*i.e.*, those boat builders not owned by Brunswick).

Brunswick's market share contracts offered rebates in return for commitments whereby the boat builders agreed to purchase 80% of their stern drive and inboard engine requirements from Brunswick for as long as three years, with additional incentives for long-term purchase commitments.

Both the purpose and result of the market share strategy was regularly documented by Brunswick and its long-time advisor, McKinsey & Company. In late 1991, joint Brunswick and McKinsey "teams" recommended marketing strategies that would "build cost effective entry barriers at boat builders," "build cost effective entry barriers at dealers," "limit Volvo's penetration at Genmar," and "break up the buying groups." Brunswick's Board of Directors adopted these recommendations on October 22, 1991.

This strategy built on ongoing initiatives begun in the summer of 1991 with the documented purpose of "[s]trengthen[ing] barriers at boat builders *and* dealers." Brunswick concluded two long-term contracts with key boat builders for the express purpose of "creat[ing] barriers to competitive entry." In addition, at about the same time, Brunswick instituted *dealer* market share programs in the 1992 model year to "[c]reate barrier[s] to competitors' entry (protect market share)." Like the boat builder market share agreements, the contracts with boat dealers – acknowledged as the exclusive viable distribution outlet – afforded discounts to dealers who sold a high percentage of boats equipped with Brunswick's engines.

The synergistic effect of these operationally separate yet strategically interrelated market share programs was powerful. Boat builders who might otherwise have switched to rival stern drive engines were discouraged from doing so because many of their customers, *i.e.*, dealers, had 80% or 100% market share agreements with Brunswick and thus would not accept boats equipped with alternative power sources. Similarly, dealers desiring to switch to Volvo, Yamaha, or OMC-powered boats were foreclosed from doing so because their boat builder/suppliers had similar market share agreements with Brunswick. A Brunswick witness at trial acknowledged that establishing entry barriers at the dealer level "created real problems" for Brunswick's most significant competitor, Volvo.

The real world impact of these programs was dramatic. The vast majority of boat builders were economically unable to switch to alternate engine suppliers. At trial, numerous boat builders testified that their purchasing discretion was effectively eliminated by market share contracts. Consistent with this boat builder perspective, during this period Brunswick's market share grew to approximately 80% despite the technological superiority of rival engines (which was acknowledged by Brunswick's Chief Engineer). Moreover,

OMC representatives testified regarding their inability to overcome Brunswick's market share programs and observed that such programs established a substantial barrier to their expansion.

By 1994, Brunswick's strategy had achieved significant success. In 1993, OMC discontinued manufacturing its own stern drive engines and entered into a joint venture with Volvo. In 1994, Yamaha exited the stern drive market altogether, citing its inability to achieve adequate distribution because of Brunswick's market share programs and other exclusionary practices. In 1994, Brunswick refined its marketing program with the express purpose to "lock in" customers, to put its customers in "golden hand-cuffs," and to "lock out" Volvo – the sole remaining viable competitor. The program, like its predecessor, was overwhelmingly successful. Thus, whereas robust competition had been developing in the mid-1980s, by the 1990s, Brunswick had only one remaining significant competitor, Brunswick's market share had grown to approximately 80%, and Brunswick was reaping extraordinary profits.

The economic logic which shaped Brunswick's market share programs and drove the purchasing behavior of boat builders is critical to understand. Take, for example, a hypothetical boat company purchasing 100% of its 1,000 stern drive and inboard engine requirements from Brunswick at $5000 per engine. If Brunswick offered (as it did) a 7% rebate if a purchaser satisfied an 80% market share threshold, Brunswick's competitor would need to offer a $350,000 discount in order to receive 50% of that business. Because that discount would be spread across only 500 engine units, it would amount to $700 per engine or a 14% rebate. Thus, while Brunswick could maintain the boat company as a customer by offering a 7% rebate for an 80% market share commitment, Brunswick's competitor would need to offer a 14% discount to obtain half of the boat company's business. As documented at trial, the small non-foreclosed market

segment available to Brunswick's sole remaining stern drive engine rival, Volvo, had already resulted in Volvo's operating below minimum efficient scale. Accordingly, Volvo could not overcome Brunswick's market share programs: it could not offer deeper discounts that would only serve to increase its losses.

This entry barrier prevented the usual competition whereby each seller offers slightly lower prices to obtain additional business. While the Eighth Circuit did not credit the practical economic road-block that such market share programs can, and in the instant situation did, create, even Brunswick's chief economic expert, Dr. Warren-Bolton, had previously noted in *Business Week* magazine that: "[t]he reality is that things like market share requirements ... can be very effective at imposing very high costs on entrants, but no cost at all on the dominant firm." *Are Corporate Predators On The Loose?*, Business Week, Feb. 23, 1998, at 126.

C. Expert Economic Analysis.

Plaintiffs' expert economic analysis was provided by Dr. Robert Hall, a Senior Fellow at the Hoover Institution and Professor of Economics at Stanford University. He is the author of numerous books and articles, and wrote the chapter on economic damages for the Federal Judicial Center's *Reference Manual on Scientific Evidence* (1994) that is used by federal judges nationwide. The Department of Justice selected Dr. Hall as its principal expert economist in the Government's first civil action against Microsoft. The *New York Times* described Dr. Hall as a "respected mainstream economist who is often mentioned as a candidate for the Nobel Prize." Steve Lohr, *The Nation: U.S. v. Microsoft FAQ, Court Is Not Where They'd Like To Go Today*, New York Times, Jan. 18, 1998, at 4-5. Dr. Hall's testimony was premised on a thorough analysis of the marine engine industry which spanned over a year, during which time he and his team had access to, and made use of, all documents and electronic data produced during discovery as well as a vast

collection of industry information. The result of this analysis led Dr. Hall to opine on two related, yet separate, subjects: liability and damages.

1. Liability.

Dr. Hall's conclusion of liability was premised, solely and exclusively, on the time-tested methods historically subscribed to by economists. In particular, having defined the relevant market (which Brunswick did not contest on appeal), Dr. Hall calculated Brunswick's market share, and evaluated Brunswick's ability to control prices and/or exclude competitors, its pricing behavior both in absolute terms and in relation to its costs, and the presence or absence of natural and/or artificial barriers to entry or expansion. Dr. Hall concluded that Brunswick's unusually high market share (75%-80%), its substantial mark-ups of price over costs, and its ability to control prices constituted strong evidence of Brunswick's market power. Dr. Hall further described the significant natural entry barriers found in the stern drive market, including substantial capital requirements, brand name recognition, the need for an extensive dealer network, and the need to provide on-going service and training.

Dr. Hall also noted the artificial barriers to entry or expansion strategically implemented by Brunswick. The result of each such artificial barrier was to entrench Brunswick's dominance. Among others, Dr. Hall focused on Brunswick's boat company acquisitions, its market share programs, and its explicit attempts to break up the buying groups – boat company collectives formed to obtain favorable pricing. Each of these initiatives was designed to shrink the market available to rivals, erect artificial entry barriers, or eliminate purchasing power in the hands of customers.

2. Damages.

Having determined that competition had been suppressed as a result of Brunswick's actions, Dr. Hall sought to quantify the amount by which Brunswick's stern drive engine

customers were overcharged. To perform this function, Dr. Hall utilized the Cournot model, a mainstream economic tool, which has been widely endorsed by eminent economists and serves as a foundation for numerous principles of antitrust economics. For example, the Cournot model has been praised by Professor Herbert Hovenkamp as "[t]he most important historical model of non-cooperative oligopoly" that "remains highly influential and forms the basis for many more complex variations." Herbert Hovencamp, *Federal Antitrust Policy* § 4.2, at 152 (1994). See also Carl Shapiro, *Handbook of Industrial Organization* 342-43, 350, 352 (1989); Dennis Carlton and Jeffrey Perloff, *Modern Industrial Organization* 233 (2d ed. 1994). Furthermore, as the district court noted, "... the Cournot model provides the theoretical underpinnings for the Department of Justice's Horizontal Merger Guidelines and the widely used Herfindahl-Hirschman Index." Pet. App. 70a.

As Dr. Hall testified, the Cournot model postulates that market power is manifested through pricing in excess of the competitive level: the greater the market power, the greater the overcharge. In order to quantify the instant overcharge, Dr. Hall assumed a competitive market consisting of two equal producers. In fact, the 50/50 beginning point was not only conservative (as a competitive benchmark of three or more equal rivals would have translated to a lower equilibrium price and higher damages) but also closely approximated Brunswick's actual market share in 1988 – the most recent date before its exclusionary strategy took effect. Application of the model following this conservative equilibrium assumption yielded Dr. Hall's overcharge calculations based on Brunswick's actual market share.

Dr. Hall used the Cournot model strictly to quantify damages, and it played no part in his liability analysis, which was based on voluminous record evidence and industry data. Indeed, he did not even discuss the Cournot model or the

equal-share hypothetical market until Section IX of his report, entitled "Damages."

III. DISTRICT COURT PROCEEDINGS.

The jury rendered its verdict in favor of the boat builders on all three antitrust claims against Brunswick: (1) acquisition of anticompetitive assets in violation of section 7 of the Clayton Act; (2) unreasonable restraint of trade under section 1 of the Sherman Act; and (3) illegal monopolization under section 2 of the Sherman Act.

The district court, which oversaw years of pre-trial activity and ten weeks of trial, rejected Brunswick's challenges to the jury verdict. On the Clayton Act claim, it dismissed summarily Brunswick's statute of limitations claim because of its continuing stream of acquisitions in violation of section 7. Pet. App. 81a.

On the Sherman Act claims, the district court determined that there was abundant and credible evidence supporting the jury verdict. Such evidence included testimony from boat builders that adherence to Brunswick's market-share agreements was "their only viable economic option," and that in order to remain in business boat builders had to achieve the maximum discounts; expert testimony regarding the "tax effect" of the discounts, which, combined with the acquisitions, resulted in a 78% foreclosure rate of the overall relevant market; and testimony that the "two-tier" boat builder and dealer market share programs were mutually reinforcing restraints of trade. Pet. App. 64a. The court also held that the jury could rely on the fact that "Brunswick's business documents are riddled with acknowledgements of the anticompetitive nature of these agreements." *Id.* at 65a.

The district court also rejected Brunswick's suggestion that a monopolist receives antitrust immunity simply because it prices its product above its average cost. It held that the predatory-pricing cases embracing an "above-cost" rule do *not* per se validate all above-cost pricing programs which may

be combined with additional restraints or otherwise structured in an anticompetitive manner. Pet. App. 61a.

The district court also denied Brunswick's renewed challenge to the admission of Dr. Hall's testimony, which was based principally on the equal-shares assumption Dr. Hall used in applying the Cournot model in constructing a hypothetical market. First, the district court recognized that, contrary to Brunswick's suggestion, this assumption was *not* a feature of Dr. Hall's liability conclusion, but rather one element (and a conservative one at that) of Dr. Hall's damages analysis. Second, the district court correctly held that Dr. Hall *did* consider actual market occurrences which were unrelated to anticompetitive activity and, in fact, resulted in market share gains for Brunswick. In doing so, the district court observed that Dr. Hall specifically testified regarding the two market events which Brunswick raised – the OMC product-recall problems and the OMC/Volvo joint venture – and noted Dr. Hall's testimony that all successful market participants both gain and lose market share as a result of exogenous market events. Pet. App. 54a.

Finally, the district court observed that Brunswick had not even sought to argue that the Cournot model was an improper or inappropriate method of predicting equilibrium price formation in oligopolistic markets. Pet. App. 70a. Thus, the district court held that Brunswick's challenges were limited to "complaints about how Dr. Hall applied the Cournot model to the facts of this case," which could not be the basis for exclusion of expert evidence under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In any event, the court ruled that Brunswick's attacks were unjustified:

> In each instance Brunswick argues that an opinion is a "completely unfounded" or "speculative" or "bogus", even though every one of the opinions was carefully ex-

plained by Dr. Hall, was reasonable under the circumstances, and has abundant support in the factual record.

Pet. App. at 71a.

IV. COURT OF APPEALS'S DECISION.

The Eighth Circuit reversed the district court and granted judgment as a matter of law to Brunswick, staking out legal principles which follow neither the precedent of this Court nor the tenets of other circuits. First, it held the section 7 claims under the Clayton Act challenging Brunswick's acquisitions were time-barred because the boat builders' future damages were calculable in 1990. Pet App. 22a. According to the court, the retention of the monopoly-creating assets was not a continuing violation; even if it were, there was no independent overt act injuring the boat builders, a requirement the Eighth Circuit imported in from price-fixing conspiracy cases under the Sherman Act. *Id.* at 20a.

On the Sherman Act claims, the court of appeals held that the market-share agreements were not exclusionary because they did not expressly forbid boat customers to deal with competitors, and because in fact two customers switched most of their business to competitors in this time period. Pet. App. 34a. The court also held the jury could not infer market power from Brunswick's dominant 78% market share, absent independent proof that barriers to entry were significant. *Id.* at 34a-35a. Finally, the court held that price-related conduct cannot be anticompetitive so long as the monopolist prices above costs. Thus, a plaintiff must demonstrate below-cost prices in a case involving "pricing" even where a monopolist's discounting scheme forecloses a large portion of the market and raises entry barriers. *Id.* at 39a-40a.

The Eighth Circuit also invoked *Daubert* to exclude Dr. Hall's testimony because his assumption of equal shares of two competitors in the hypothetical market did not take into account market realities. Pet. App. 28a-29a. The court of

appeals assumed the validity of the Cournot model in this case, but held that under *Daubert* an expert's testimony may be excluded if the expert "has not considered all of the relevant facts." *Id.* at 27a. It then proceeded to exclude Dr. Hall's testimony because, in its judgment, it did not fit the facts of this case. *Id.* at 30a. In the Eighth Circuit's view, Dr. Hall's construction of a hypothetical "but for" market in which competitors have equal shares "ignored inconvenient evidence"[1] and "failed to account for market events."[2] The court of appeals excluded his testimony *in toto*, and held that this was an independent basis for granting Brunswick judgment as a matter of law on the Sherman Act claims, *id.* at 31a, even though Dr. Hall's testimony regarding the hypothetical market only pertained to the quantification of damages and was not part of his testimony on liability.

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[1] Pet. App. 28a. The "inconvenient evidence" cited by the Eighth Circuit was Brunswick's purported "75% share" in the mid-1980s *before* it started the market share discounts and *before* it acquired Bayliner and SeaRay." *Id.* at 28a-29a. In reality, no such "fact" was established at trial; indeed, two senior Brunswick employees and Brunswick's chief economic expert each testified that it was *impossible* to determine Brunswick's market share in the mid-1980s. Other evidence, on which Dr. Hall relied in formulating his opinion, estimated that share as under 60%. Moreover, in finding this "fact" dispositive, the Eighth Circuit ignored the evidence (relied on by Dr. Hall) that the mid-1980s was a very different market because Brunswick had exclusive patent rights until 1985.

[2] Pet. App. 29a. Because as the Eighth Circuit acknowledged, Dr. Hall testified that he *did* take into account the market events in question, *id.*, the Eighth Circuit appears to have ruled that such factors had to be numerically incorporated into his model in order to pass muster under *Daubert*. *See id.*

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS'S CLAYTON ACT RULING CONFLICTS WITH PRECEDENTS OF THIS COURT AND OTHER COURTS OF APPEALS.

Section 7 of the Clayton Act prohibits acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly," 15 U.S.C. § 18, as well as the continuing retention of the acquired assets. *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 240-41 (1975); see also *United States* v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 596-97 (1957). The Eighth Circuit's ruling that the continuing retention of anticompetitive assets is not a continuing violation of the Clayton Act conflicts squarely with *ITT* and *du Pont*. Moreover, its corollary holding that antitrust injury to business and property from continuing antitrust violations does not restart the limitations period is at odds with the rulings of this Court and the courts of appeals.

A. Continuing Violation.

Petitioners' Section 7 claims were predicated on a series of acquisitions of boat builders by Brunswick that were a central part of its strategy of market domination. Most notable of these acquisitions were those of Bayliner and Sea Ray in 1986, which together represented 40% of the stern drive market. See *supra* at 3. The Eighth Circuit characterized the holding of these assets as an "'unabated inertial consequence[]'" of the initial acquisition and not a continuing violation of section 7. See Pet. App. 20a.

This ruling simply cannot be reconciled with *ITT*, in which this Court expressly held that the retention of assets was a "continuing violation" of an FTC consent decree under Section 7 prohibiting the acquisition of monopolistic assets, *ITT*, 420 U.S. at 226, even if the initial acquisition did not

pose any realistic threat of restraint of commerce or creation of a monopoly, *id.* at 242. Similarly, in *du Pont*, this Court held that there is a violation of the Clayton Act any time the acquisition threatens to ripen into a prohibited effect. 353 U.S. at 597. Thus, this Court held that an acquisition completed in 1917 was subject to equitable abatement 40 years later. See *id.* at 607. Thus, *du Pont* (like *ITT*) necessarily held that anticompetitive retention of assets is a continuing violation of section 7, and not simply "inertial consequences" of wholly past violations. The Eighth Circuit's holding on the continuing violation issue thus flatly contradicts this Court's precedent.

B. Limitations Period.

The Eighth Circuit held in the alternative that, even if an acquisition is a continuing violation, the statute of limitations is not restarted by plaintiffs' continuing antitrust injury from those acquisitions. Pet. App. 20a. This holding is in conflict with the Clayton Act limitations rule of *Zenith Radio Corp.* v. *Hazeltine Research Inc.*, 401 U.S. 321 (1971).

All private antitrust cases are governed by the statute of limitations found in section 4B of the Clayton Act, which requires that an action be commenced "within four years after the cause of action accrued." 15 U.S.C. § 15b. The statute of limitations begins to run when a "defendant commits an act that injures a plaintiff's business." *Zenith*, 401 U.S. at 338. The "act" referred to in *Zenith* means an act in violation of the antitrust laws. *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 198 (1997) (Scalia, J., concurring in the judgment). Furthermore, to restart the limitations period, that act must cause the plaintiff specific antitrust injury to "business or property," 15 U.S.C. § 15a; *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), *i.e.*, injury "attributable to an anticompetitive aspect of the practice under scrutiny." *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 334 (1990). Here the act in violation of section 7 is the continued holding of monopoly-creating assets, and the resulting

antitrust injury is the foreclosure of 40% of the market which, in conjunction with the illegal restraints of trade, prevented competitive entry at a minimum viable scale, thus allowing Brunswick to charge supracompetitive engine prices. See *supra* at 3-7.

The Eighth Circuit justified its departure from the *Zenith* rule by requiring a "separate overt act" in addition to the continued holding of assets. This analysis is misconceived; the overt-act requirement for Sherman Act conspiracies, see *Klehr*, 521 U.S. at 189, has no bearing on Section 7 Clayton Act claims. Overt acts are required in price-fixing conspiracies because otherwise there is no way to link the violation (the price-fixing conspiracy) to antitrust injury to a particular plaintiff. Thus, the plaintiff must be able to allege an overt act injuring it, such as a sale at supracompetitive prices – within the last four years – to recover damages within that period. See *id.* at 185. Here, the evidence showed antitrust injury (foreclosure resulting in Brunswick's supracompetitive prices) caused directly by an act that violates Section 7 (the continued holding of assets that gave Brunswick a dominant position and squelched competition).[3]

Because of its misconception of what constitutes an "act" in violation of the antitrust laws under *Zenith*, the Eighth Circuit decision also conflicts with decisions of the courts of appeals finding that violations of antitrust laws resulting in competitive injury restart the limitations period. For example,

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[3] The Eighth Circuit's ruling is also at odds with *Zenith* in another respect. This Court held that each separate cause of action accruing under section 7 of the Clayton Act entitles a plaintiff to recover "future damages unless the fact of their accrual is speculative or their amount and nature unprovable." *Zenith*, 401 U.S. at 339. Because Brunswick had not yet implemented the combination of market share programs that were developed in 1991 and 1992, which dramatically intensified the anticompetitive effect of its prior acquisitions, the nature and amount of petitioners' future damages for the section 7 violation would not have been provable without speculation had suit been brought in 1990.

the Ninth Circuit has held that each time a plaintiff's interest is invaded to its economic detriment, the statute of limitations begins to run at that time. See *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co., Inc.*, 512 F.2d 1264, 1270 (9th Cir. 1975) (allowing private action for damages from a long-term exclusive supply contract between a former owner of the franchise and a concessionaire formed more than four years prior to suit because of the "necessarily continuing nature of the alleged harm"). Similarly, recognizing that the "general rule" that an "antitrust cause of action accrues each time a defendant commits an act that injures plaintiff ... applies to all types of anticompetitive behavior, including refusals to deal," the Fifth Circuit has held that a continuing refusal to deal constitutes an "act" within the meaning of *Zenith*, and restarts the limitations period. *Bell* v. *Dow Chem. Co.*, 847 F.2d 1179, 1186-87 (5th Cir. 1988); *accord Poster Exchange, Inc.* v. *National Screen Serv. Corp.*, 517 F.2d 117, 128 (5th Cir. 1975); *LaSalvia* v. *United Dairymen*, 804 F.2d 1113, 1119 (9th Cir. 1986). This Court should grant certiorari to resolve this conflict.[4]

II. THE EIGHTH CIRCUIT'S SHERMAN ACT RULINGS CONFLICT WITH THE PRECEDENTS OF THIS COURT AND OTHER COURTS OF APPEALS.

The Eighth Circuit's rulings setting aside the jury verdict and granting Brunswick judgment as a matter of law on counts brought under Sections 1 and 2 of the Sherman Act are infected with multiple errors of law that conflict with the

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[4] The policy of repose relied on by the Eighth Circuit, Pet. App. 20a-21a; *see Klehr*, 521 U.S. at 187; *Wilson* v. *Garcia* 471 U.S. 261, 271 (1985), is not jeopardized when Brunswick is engaged in an act (retention of anticompetitive assets) that constitutes an ongoing violation of the antitrust laws. The only repose to which Brunswick is entitled is that petitioners cannot recover from injury (*e.g.*, sales at supracompetitive prices) that occurred more than four years prior to suit. *See Klehr*, 521 U.S. at 187.

precedents of this Court and the courts of appeals. Moreover, the decision below effectively grants Brunswick a perpetual license to dominate its industry by use of a recognized anticompetitive tactic, and more broadly undermines the power of antitrust law to redress pricing-related exclusionary conduct. This Court should act now to address these important issues on which courts are divided.

A. Market Share Agreements Employed By Firms With Significant Market Power Are An Insidious Form Of Restraint On Trade.

Section 1 of the Sherman Act prohibits every unreasonable "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1; *Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918). Brunswick's market-share agreements with boat builders and boat dealers are clearly contracts unreasonably designed to restrain trade; they are multiyear contracts with the express requirement that the builders or dealers reduce the share of business they do with Brunswick's competitors, for which Brunswick pays consideration in the form of broad discounts on the price of its engines. See *supra* at 4-7. Indeed, Brunswick gives broad price discounts even to customers who purchase *fewer* engines from it, so long as their purchases from competitors are reduced proportionally more.

Despite the Eighth Circuit's dismissive statement that Brunswick's discount program did not constitute "anticompetitive conduct," Pet. App. 34a, antitrust experts do not agree. In a leading article, senior Federal Trade Commission officials have concluded that the Sherman Act condemns market-share agreements structured to produce total or partial exclusivity. See Willard K. Tom et al., *Anti-competitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing*, 67 Antitrust L.J. 615, 616 (2000). Citing the *district court's* decision in this case with approval, the authors state that an agreement which does not

impose absolute exclusivity can cause anticompetitive effects and should be condemned as anticompetitive. *Id.* at 634.[5]

The record is replete with evidence from Brunswick's documents, customers, competitors, and a leading antitrust economist of the ill effects of Brunswick's market-share tactics, which erected artificial barriers to entry and foreclosed 78% of the boat engine market. Brunswick's own strategic planning documents characterize the market-share agreements as "golden handcuffs" that impose economic penalties on customers who do not comply; there could be no more vivid and apt metaphor for a "restraint" on trade. In order to avoid economic penalties, boat builders are forced to accept Brunswick's market share rebates. Once Brunswick implemented market share agreements at the dealer level, there was little possibility of escape. Boat builders were foreclosed from switching to another engine because many of their customers, the dealers, had market share agreements with Brunswick (*i.e.*, had committed to purchase 80% and 100% of their boats with Brunswick engines). Dealers who wanted to switch to another engine were similarly foreclosed from doing so, as their boat builder suppliers were bound by market share agreements with Brunswick. See *supra* at 5.

Usurping the jury's role as trier of fact, the Eighth Circuit nullified this overwhelming evidence and granted judgment for Brunswick by establishing two rules of law that have no foundation in antitrust principles: (1) that customer agreements that do not expressly forbid trade with

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[5] *See also* Richard M. Steuer, *Discounts and Exclusive Dealing*, 7-SPG Antitrust 28, 30-31 (1993) (quantity discounts that foreclose competition can violate antitrust laws); David A. Balto, *Networks And Exclusivity: Antitrust Analysis To Promote Network Competition*, 7 Geo. Mason L. Rev. 523 (1999) (stating that discounts that induce exclusivity may raise entry barriers and the costs of current rivals in violation of antitrust laws, and urging adoption of a "refined and careful" approach to the analysis of de facto exclusivity agreements (*i.e.* market-share discounts) similar to that employed by the district court in this case).

competitors and do not, in effect, preclude all customers from buying competitive products are not unreasonable restraints of trade, and (2) that dominant market share of 78% does not create a jury question as to the existence of market power in the absence of independent proof of significant barriers to entry. These rulings are contrary to the precedents of this Court and the courts of appeals, and this Court should grant certiorari to resolve the conflict.

B. There Is A Split Of Authority As To Whether Customer-Based Restraints Of Trade Are Cognizable Under The Sherman Act Only If Universally Exclusionary.

The court of appeals overturned the jury's Section 1 verdict and held that as a matter of law the market-share agreements "were not exclusionary," Pet. App. 36a, because there was no express prohibition against the purchase of competitors' products and there was evidence that two customers shifted business from Brunswick to competitors. *Id.* at 34a. Thus, even in the face of overwhelming evidence that Brunswick's two-tiered market share agreements restrained purchasers from buying competitors' engines, the Eighth Circuit determined that evidence that the exclusionary effect was not universal among all of the monopolist's customers required judgment as a matter of law in favor of the monopolist.

In adopting a universal-exclusion rule that permitted it to disregard overwhelming evidence that the market share agreements were anticompetitive, the Eighth Circuit has violated this Court's rule that the courts may not decide antitrust claims based "on formalistic distinctions" rather than market realities. *Eastman Kodak Co.* v. *Image Technical Serv.*, 504 U.S. 451, 466-67 (1993). Every case involving the rule of reason must focus on the totality of the "particular facts disclosed by the record," *id.*; *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977), in order to discern the practical effect of the restraint on the market as a whole. *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 326

(1961). Thus, the purchasing actions of two customers, based on their own business circumstances and judgments, cannot as a matter of law override extensive evidence from other customers, competitors, and experts. Whether the agreements are anticompetitive restraints of trade requires a thorough analysis of the effects on the overall market. At most, the evidence relied on by the Eighth Circuit should be weighed by the jury against countervailing evidence from other boat builders and dealers in determining whether the market-share agreements were anticompetitive in effect.

In all exclusive dealing cases (whether express, or, as here, implied), courts have held that the unreasonableness of the restraint depends on the overall effect on competition in the relevant market, not on whether certain customers were able to resist the incentive for exclusive dealing. See *Tampa Elec.*, 365 U.S. at 326; *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J. concurring) (exclusive dealing is an unreasonable restraint on trade "when a significant fraction of buyers and sellers are frozen out of a market by the exclusive deal"); *Anchor Serum Co.* v. *Federal Trade Comm'n*, 217 F.2d 867, 871 (7th Cir. 1954); *Barr Labs., Inc.* v. *Abbott Labs.*, 978 F.2d 98, 110 (3d Cir. 1992); *Advanced Health-Care Serv.* v. *Radford Com. Hosp.*, 910 F.2d 139, 151 (4th Cir. 1990). Rather, the issue is whether (1) an implied exclusionary agreement is formed between any buyer and seller where the buyer is subject to penalties or afforded special benefits, see *Tampa Electric*, 365 U.S. at 326, and (2) whether, the agreements that are formed resulted in a lessening of competition in the market as a whole. See *United Shoe Mach. Corp.* v. *United States*, 258 U.S 454, 457 (1922). The Eighth Circuit's universal exclusion rule cannot be reconciled with *Kodak* or the exclusive dealing cases.

C. The Eighth Circuit's Holding That The Jury Could Not Infer Market Power From Brunswick's 78% Share Of The Market Is In Conflict With Decisions Of Other Courts Of Appeals.

The Eighth Circuit attempted to bolster its Section 1 ruling by holding in the alternative that petitioners' proof failed as a matter of law in a second element of its claim – namely, that Brunswick had the market power to necessary to destroy competition with the restraint of trade – on the grounds that there was no proof of significant barriers to entry. See Pet. App. 34a-35a; cf. *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (rule of reason cases under Sherman Act section 1 require inquiry into market power); *Double D Spotting Serv., Inc.* v. *Supervalu, Inc.*, 136 F.3d 554, 558 (8th Cir. 1998). Accordingly, despite acknowledging evidence that Brunswick had developed a 78% share of the relevant market, Pet. App. 9a, the Eighth Circuit took the issue of market power away from the jury on the theory that the petitioners had not independently proved the existence of barriers of entry. *Id.* at 34a-35a.

This analysis is contrary to basic antitrust principles and in direct conflict with the rules in other circuits that "market share estimated with reasonable confidence to fall between 60 and 65% suffices to raise a jury question" concerning market power. *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 999 (11th Cir. 1993) (citing *McGahee* v. *Northern Propane Gas., Co.*, 858 F.2d 1487, 1506 (11th Cir. 1988)). See also *Kodak*, 504 U.S. at 464 ("The existence of [market] power *ordinarily is inferred* from the seller's possession of a predominant share of the market.") (emphasis added). *Accord Broadway Delivery Corp.* v. *United Parcel Serv. of Am. Inc.*, 651 F.2d 122, 129 (2d Cir. 1981) ("a share above 70% is usually strong evidence of market power"); *Advanced Health-Care*, 910 F.2d at 147 (proof of dominant market share would withstand grant of summary judgment on issue of market

power); *Valley Liquors, Inc.* v. *Renfield Imps., Ltd.*, 822 F.2d 656, 666 (7th Cir. 1987) ("approximately 70%-75% of market share constitutes market power"); *Heatransfer Corp.* v. *Volkswagenwerk, A.G.*, 553 F.2d 964, 981 (5th Cir. 1977) (relevant market share of 71%-76% was "sufficient to establish a monopoly power").

Indeed, the leading treatise on antitrust law suggests that a plaintiff makes out a *prima facie* case of market power by showing market share of this magnitude, and the burden shifts to *the defendant* to show significant and recurring entry that is inconsistent with the normal inference of market power. Phillip E. Areeda & Herbert Hovencamp, *Antitrust Law* ¶ 420b, at 58-59 (1995). The Eighth Circuit, despite its proclivity for usurping the role of factfinder, did not purport to suggest that the evidence indicated significant and recurring entry in the stern drive engine market, and its "dominant-market-share-plus" rule for Section 1 claims is flatly inconsistent with the rule in other circuits. This is another conflict of authority posed by the decision below that the Court should resolve.

D. There Is A Split Of Authority As To Whether A Practice Is Anticompetitive Under Sections 1 And 2 Of The Sherman Act If The Defendant Offers Prices Above Costs.

Section 2 of the Sherman Act prohibits "monopoliz[ing], or attempt[ing] to monopolize ... any part of the trade or commerce among the several States ...." 15 U.S.C. § 2; *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). In a departure from the applicable precedent of this Court, the Eighth Circuit established a "general rule that above cost discounting is not anticompetitive" for Sherman Act § 2 claims, Pet. App. 39a, even where a monopolist's discounting scheme results in the foreclosure of 78 % of the market and raises entry barriers. See *id.* at 38a-41a.

The Eighth Circuit derived its "general rule" from predatory-pricing cases, see Pet. App. 38a-40a (citing *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) and *Matsushita Electric Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)), even though it acknowledged that plaintiffs were not claiming that Brunswick engaged in such conduct: "[t]he boat builders argue[d] that the discount programs and acquisitions were part of a deliberate plan to exclude competitors from the stern drive engine market, and that this exclusion enabled Brunswick to charge *supracompetitive high prices* for its engines." *Id.* at 37a (emphasis added). See also *id.* at 40a-41a.

There is simply no foundation in antitrust law or scholarship for generalizing an above-cost rule from Robinson-Patman Act cases to all monopolization claims. As leading FTC officials and scholars recognize, "[i]ncentives to exclusive dealing involve such a different form of pricing" that Robinson-Patman authorities are inapplicable. Tom, *supra*, at 637; *accord* Steuer, *supra*, at 28 (1993) ("antitrust hates discounts offered to induce exclusive dealing when they unreasonably threaten to foreclose competition); Balto, *supra*, at 569-71.

Because the Eighth Circuit's "general rule" that above-cost pricing is not anticompetitive conduct for Sherman Act claims is so misconceived, it is in conflict with basic precedent of this Court, which almost always involve supracompetitive prices.[6] This "above cost" rule ultimately means that above-cost pricing amounts to a free pass for a monopolist to engage in any price-related exclusionary conduct. This reasoning is

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[6] Even within the predatory pricing context, courts of appeals have rejected the idea that prices above average total cost "create a 'free zone' in which monopolists can exploit their power without fear of scrutiny by the law." *See Transamerica Computer Co., Inc.* v. *International Bus. Mach., Corp.*, 698 F.2d 1377, 1386 (9th Cir. 1983); *Chillicothe Sand & Gravel Co.* v. *Martin Marietta Corp.*, 615 F.2d 427, 432 (7th Cir. 1980).

plainly inconsistent with this Court's decision in *Eastman Kodak Co.* v. *Image Technical Serv.*, 504 U.S. 451 (1993), in which this Court held that Kodak's marketing and pricing programs were unreasonable restraints of trade, even though it was assumed that that Kodak was selling at a profit. See *id.* at 470-71. The "above cost" rule also would legalize other traditional violations of the antitrust laws, such as price-related anticompetitive refusals to deal, see, *e.g.*, *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985), and price-based tying violations, *e.g.*, *United Shoe*, 258 U.S. at 464. The Eighth Circuit's new "above cost" rule insulates monopolists from any liability for price-related anticompetitive restraints so long as they charge above-cost prices.

Though at odds with almost any case properly decided under the Sherman Act, the decision below places the Eighth Circuit most directly in conflict with the Third Circuit, which pointedly rejected a claim that price-based restraints are not anticompetitive so long as prices exceed costs. See *SmithKline Corp.* v. *Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir. 1978) (holding volume-based rebate directly affecting the price, supply, and demand of the products that otherwise would have been determined by the economic laws of a competitive market was anticompetitive), *aff'g*, 427 F. Supp. 1089, 1128 (E.D. Pa. 1976) ("a monopolist does not receive immunity merely because it has priced the product in issue above its average cost"). The Eighth Circuit refused to resolve the conflict, drawing the meaningless distinction that *SmithKline* involved tying. Pet. App. 40a. See Ronald W. David, *Pricing With Strings Attached – At Sea in Concord Boat and LePage's*, 14-SUM Antitrust 69, 71 (2000) (noting that the Eighth Circuit "facilely" distinguished contrasting cases like *SmithKline* in adopting its above-cost rule). *SmithKline*, like most reasoned antitrust cases, recognizes that, outside the predatory pricing context, above-cost pricing

is the essence of anticompetitive behavior. This Court should resolve this conflict in the circuits.[7]

III. THE EIGHTH CIRCUIT'S HOLDING THAT *DAUBERT* ALLOWS EXCLUSION OF EXPERT OPINION BASED ON THE EXPERT'S TREATMENT OF THE FACTS OF THE CASE CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

In *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), this Court held that under Federal Rule of Evidence 702, the trial court should act as a "gatekeeper" in ensuring that irrelevant or unreliable expert evidence is not admitted. *Id.* at 589-92. In this case, there was no dispute over Dr. Hall's eminence as an economist in this field, nor over the soundness of the Cournot theory as a methodology for determining antitrust damages, see *supra* at 7-9. The district court, after exhaustive hearings and briefing on the admissibility of this evidence, rejected Brunswick's objections to this testimony out of hand, finding that Dr. Hall's opinion on liability and damages had "abundant support in the factual record" and "did in fact take into account" the exogenous factors that Brunswick claimed caused the rise in its market share. Pet. App. 71a; *supra* at 11.

Disregarding the fact that Brunswick's objections addressed only the portion of Dr. Hall's testimony addressing the quantification of damages, and *not* Brunswick's liability, *supra* at 13, and paying no heed to this Court's admonition that the discretion of the trial court in its gatekeeper role must be respected, *General Electric Co.* v. *Joiner*, 522 U.S. 136,

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[7] The Eighth Circuit claimed that Brunswick's market share was maintained by competition on the merits. Pet. App. 41a. Not only did the Eighth Circuit once again disregard the record, but its holding on this point is dependent upon the exclusion of Dr. Hall's testimony, which is addressed *infra* in section III.

142 (1997), the Eighth Circuit excluded the whole of Hall's testimony and granted summary judgment on the Sherman Act claims to Brunswick. The court of appeals faulted Dr. Hall for "ignor[ing] inconvenient evidence" and "fail[ing] to account for market events" unrelated to Brunswick's anticompetitive acts, Pet. App. 28a-29a, and thus declared the testimony "mere speculation." *Id.* at 30a. According to the court of appeals, Dr. Hall's testimony did not meet Rule 702's requirement of "fit" to the facts of the case. *Id.* at 26a-27a (citing *Daubert*, 509 U.S. at 591; *Kumho Tire Co.* v. *Carmichael*, 526 U.S 137, 154 (1999); and *Joiner*, 522 U.S. at 146).

The Eighth Circuit badly misconstrues this Court's precedents, none of which permits a trial court (much less an appellate court) to exclude expert evidence based on how the expert applies a valid and appropriate methodology to the facts of the case. *Daubert*'s "fit" requirement does not suggest that a lay judge may exclude an expert's opinion because he disagrees with how the expert handled certain evidence in the case. The "fit" requirement this Court stressed in *Daubert* is an aspect of relevance, and is meant to exclude "'[e]xpert testimony which does not relate to any issue in the case'" and lacks "a valid scientific connection to the pertinent inquiry." *Daubert*, 509 U.S. at 591-92. There is no doubt that the Cournot methodology used by Dr. Hall was relevant to, and thus "fits," the antitrust issues in this case.

The Eighth Circuit was wrong to think that *Kumho Tire* suggests the contrary. That case made clear that a district court had discretion to exclude evidence based on a generally valid methodology (over-deflection analysis to identify manufacturing defects in a tire) that could not reasonably be extended to "the particular matter to which the expert testimony was directly relevant" (analysis of a bald, inadequately repaired tire that showed signs of abuse and should have been taken out of service). *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 153-54 (1999) (emphasis omitted). *Kumho Tire*

would only have been on point if the court of appeals had held that there were over-whelming structural characteristics specific to the stern drive engine market that left the district court no discretion but to declare the Cournot methodology inappropriate. The Eighth Circuit did not so find, nor could it.

Finally, *Joiner* provides no support for the Eighth Circuit's analysis. There, this Court held that a district court did not abuse its discretion in excluding expert testimony that certain chemical substances caused cancer in a defendant with limited exposure based solely on studies showing that the substance was carcinogenic in mice who were injected with massive doses of it. See *Joiner*, 522 U.S. at 144. This Court concluded that the trial court could find this method of extrapolation unreliable because there was "too great an analytical gap between the data and the opinion proffered." *Id.* at 146. Dr. Hall did not try to attempt to base his opinion on unrelated data; rather he did an elaborate study of the stern drive engine market and, as the district court found, issued an opinion that had "abundant support in the factual record." Pet. App. 71a.

In short, as this Court emphasized in *Daubert*, "the focus ... must be solely on principles and methodology, not on the conclusions that they generate." 509 U.S. at 595. The Eighth Circuit was simply wrong to suggest that *Daubert* and its progeny permit exclusion of evidence on the claimed ground "that an expert opinion has not considered all of the relevant facts." Pet. App. 27a. That is the task of the trier of fact: "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596.

Because the decision below gravely misapprehends the rule of *Daubert*, it has created a significant split with decisions of numerous courts of appeals, which have rejected *Daubert* challenges claiming that the expert failed to consider or give

adequate weight to certain facts. For example, the First Circuit rejected a *Daubert* challenge to the testimony of a doctor who rendered an expert opinion without examining certain reports, holding that "[i]f the factual underpinnings of [the expert's] opinions were in fact weak, that was a matter affecting the weight and credibility of their testimony." *Mitchell* v. *United States*, 141 F.3d 8, 16-17 (1st Cir. 1998) (citations omitted). See also *McLean* v. *988011 Ontario, Ltd.*, Nos. 99-1663, 99-1664, 2000 WL 1199093, at *3 (6th Cir. Aug. 24, 2000) (mere "weaknesses in the factual basis of an expert witness' opinion ... bear on the weight of the evidence rather than on its admissibility") (citing *United States* v. *L.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir. 1993)); *Gussack* v. *Xerox Corp.*, Nos. 99-7759, 99-7889, 2000 WL 1191813, at *7 (2d Cir. Aug. 22, 2000) (an expert's conclusion should not be rejected based on the failure to take into account certain facts); *Smith* v. *Ford Motor Co.*, 215 F.3d 713, 719 (7th Cir. 2000); *Walker* v. *Soo Line R.R.*, 208 F.3d 581, 586-87 (7th Cir. 2000); *Kennedy* v. *Collagen Corp.*, 161 F.3d 1226, 1231 (9th Cir. 1998), *cert. denied*, 526 U.S. 1099 (1999).

This Court should not permit the Eighth Circuit's ruling to stand, not only because of the split of authority and the importance of this decision to this industry, but also because of the mischief it will cause courts applying *Daubert*. *Daubert* is one of this Court's most important and frequently applied precedents, with over 4,000 citations in Westlaw in the seven short years of its existence. The Eighth Circuit's ruling unduly augments the authority of the courts of appeals at the expense of district courts, and all courts at the expense of the jury. Moreover, because exclusion of evidence may result in the harsh remedy of judgment as a matter of law, *Weisgram* v. *Marley Co.* 120 S.Ct. 1011, 1022 (2000), the patently wrong principles established below threaten the same injustice done here to litigants throughout the Eighth Circuit and beyond. This Court should act now to resolve the conflict of law created by the court below.

* * * *

This case is noteworthy because it poses more than one or two significant legal issues that warrant this Court's attention. Nonetheless, each of the questions presented satisfies the traditional standards for certiorari. Each involves a legal question of national importance on which there is a difference of opinion among the courts of appeals. To be sure, it is rare that a court of appeals can render so many controversial rulings in a single opinion, but that is simply a function of the unprecedented effort by the Eighth Circuit to blink at the blatantly anticompetitive conduct of Brunswick presented by the facts of this case and recognized by the jury and the district court. At the end of the day, all of the questions deserve further review by this Court.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

Nos. 98-3732, 98-4042

CONCORD BOAT CORPORATION; GALAXIE BOAT WORKS, INC.; SEA ARROW MARINE, INC.; MARIAH BOATS, INC.; HARRIS KAYOT, INC.; ARMADA MANUFACTURING COMPANY, INC.; BAHA CRUISERS/FRP INDUSTRIES, INC.; CAMPION MARINE, INC.; CARAVELLE BOATS; KCS INTERNATIONAL/CRUISERS, INC.; MIRAGE HOLDINGS, INC.; PLAY TIME MANUFACTURING BY OHIO MARINE DISTRIBUTOR, INC.; POWERQUEST BOATS, INC.; SILVERTON MARINE CORPORATION; INDEPENDENT BOAT BUILDERS, INC.; WTYS NO. 4 INC., DOING BUSINESS AS THOMPSON BOAT CO.; CENTURY CRAFT INDUSTRIES, LTD., FORMERLY KNOWN AS VANGUARD INDUSTRIES; AVENGER MANUFACTURING; G W INVADER; MALIBU BOATS WEST; MAVERICK BOAT COMPANY, INC.; WEERES INDUSTRIES CORPORATION; DORAL INTERNATIONAL, INC.; ALBERMARLE BOATS, INC.,

Plaintiffs-Appellees,

v.

BRUNSWICK CORPORATION, A DELAWARE CORPORATION,

Defendant-Appellant,

NATIONAL ASSOCIATION OF MANUFACTURERS,

Amicus on Behalf of Appellant.

CONCORD BOAT CORPORATION; GALAXIE BOAT WORKS, INC.; SEA ARROW MARINE, INC.; MARIAH BOATS, INC.; HARRIS KAYOT, INC.; ARMADA MANUFACTURING COMPANY, INC.; BAHA CRUISERS/FRP INDUSTRIES, INC.; CAMPION MARINE, INC.; CARAVELLE BOATS, INC.; KCS

INTERNATIONAL/CRUISERS, INC.; MIRAGE HOLDINGS, INC.; PLAY TIME MANUFACTURING BY OHIO MARINE DISTRIBUTOR, INC.; POWERQUEST BOATS, INC.; SILVERTON MARINE CORPORATION; THOMPSON BOAT COMPANY; INDEPENDENT BOAT BUILDERS, INC.; WTYS NO. 4 INC., DOING BUSINESS AS THOMPSON BOAT COMPANY; CENTURY CRAFT INDUSTRIES, LTD., FORMERLY KNOWN AS VANGUARD INDUSTRIES; AVENGER MANUFACTURING; G W INVADER; MALIBU BOATS WEST; MAVERICK BOAT COMPANY, INC.; WEERES INDUSTRIES CORPORATION; DORAL INTERNATIONAL, INC.; ALBERMARLE BOATS, INCORPORATED,

Plaintiffs-Appellants,

v.

BRUNSWICK CORPORATION, A DELAWARE CORPORATION,

Defendant-Appellee,

NATIONAL ASSOCIATION OF MANUFACTURERS

Amicus on Behalf of Appellee.

Submitted Sept. 15, 1999.
Decided March 24, 2000.

Rehearing and Rehearing En Banc
Denied June 13, 2000.

Before McMILLIAN and MURPHY, Circuit Judges, and BOGUE,[1] District Judge.

DIANA E. MURPHY, Circuit Judge.

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[1] The Honorable Andrew W. Bogue, United States District Judge for the District of South Dakota, sitting by designation.

A number of boat builders[2] brought this antitrust action against stern drive engine manufacturer Brunswick Corporation (Brunswick) for violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1994), and of Section 7 of the Clayton Act, 15 U.S.C. § 18 (1994). Brunswick counterclaimed, arguing that the boat builders had themselves conspired to restrain trade in violation of Section 1 of the Sherman Act. The case was tried to a jury for ten weeks, and a verdict was returned in favor of the boat builders for $44,371,761. Post trial motions were filed by both sides, and judgment was eventually entered for the boat builders in the amount of $133,115,283, plus $7,783,224 in attorney fees and $1,267,424 in costs. The district court granted Brunswick's motion for judgment as a matter of law on its counterclaim, but denied its motions for a new trial and for judgment as a matter of law on the boat builders' claims. It also denied the boat builders' motion for equitable relief. Both sides appeal, and we reverse.

I.

A.

Neither side contests the finding of the jury that the relevant market is the market for inboard and stern drive marine engines. Since the early 1980s there have been a number of manufacturers in the market, including inboard manufacturers PCM, Indmar, Crusader, Volvo, Marine Power, MTU, Caterpillar, Detroit Diesel, Cummins, and Toyota, and stern drive manufacturers Brunswick, Outboard Marine Corporation (OMC), Volvo Penta of the Americas (Volvo), and Yamaha. In this opinion we employ the term "stern drive engines" to include both types of engines.

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[2] The plaintiffs include twenty four corporations that manufacture and sell recreational boats; they are located in various states, including Arkansas, California, Florida, Illinois, Indiana, Kentucky, Texas, Michigan, Minnesota, New Jersey, North Carolina, Ohio, Washington, Wisconsin, and Canada. An additional party plaintiff is an Illinois buying cooperative composed of recreational boat manufacturers.

The manufacturers use standard automobile engine blocks to make stern drive engines for motor boats. They "marinize" the automobile engines and equip them with a drive system and then sell them to boat builders who may be affiliated with the manufacturer or may be independent buyers. The boat builders install the engines in their brand name boats and sell the completed boats to dealers. Stern drive engines are used primarily in recreational power boats known as runabouts, which are typical water skiing boats, and in cruising boats, which are larger and more expensive boats and usually have cabins. Runabouts and cruising boats together make up about 40% of all recreational power boats.

Brunswick has been the market leader in stern drive engine manufacturing for many years, and by 1983 it had earned a 75% market share. Beginning in 1982 it employed McKinsey & Company (McKinsey) to provide consulting services to its engine business. McKinsey consultants suggested various ways for Brunswick to increase the sales of its engines. In 1984 Brunswick began to offer market share discounts to boat builders and dealers. Several of its competitors, including Volvo and OMC, also offered market share discounts at about the same time. Under the Brunswick programs, boat builders and dealers could agree to purchase a certain percentage of their engine requirements from Brunswick for a fixed period of time in exchange for a discount off the list price of the engine. From 1984 to 1994, Brunswick offered a 3% discount to boat builders who bought 80% of their engines from the company, a 2% discount for 70% of all purchases, and a 1% discount for those who took 60% of their needs from Brunswick. For the 1995 to 1997 model year program, the market share requirements were reduced so that the maximum 3% discount could be earned by buying 70% from Brunswick; customers could receive a 2% discount for 65% market share and 1% for 60% market share. Another feature was added to the program in 1989 to offer long term discounts of an additional 1 or 2% to anyone who signed a

market share agreement for two to three years.[3] Boat builders also could receive a volume discount of up to 5% based on the quantity of engines purchased. Brunswick attempted to increase its market share requirement to 95% in its proposed 1994 "Industry Growth Program," but was unsuccessful due to serious backlash from boat builders. The market share discounts were eliminated entirely in the middle of 1997.

Neither the regular market share discount program, the long term program, nor the volume discount program obligated boat builders and dealers to purchase engines from Brunswick, and none of the programs restricted the ability of builders and dealers to purchase engines from other engine manufacturers. Builders and dealers were able to buy up to 40% of their engines from other manufacturers and still obtain a discount from Brunswick. Several boat builders chose to take a higher percentage of their engines from Brunswick than necessary to qualify for its largest market share discount; some purchased 95 or 100% of their engines from Brunswick.

In the year after Brunswick and other stern drive engine manufacturers instituted market share discount programs, Brunswick's largest domestic competitor, OMC, introduced a new stern drive engine called the "Cobra." The Cobra engine registered solid early sales, which increased OMC's stern drive engine market share and simultaneously reduced

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[3] Four financially troubled boatbuilders—Baja, Porter, Pro-Line, and Fountain—entered into long term contracts with Brunswick in exchange for financial assistance. The contracts were for three to five years and, in the case of Baja and Porter, they contained some provisions extending beyond five years. The Baja and Fountain contracts required those companies to purchase 100% of their engines from Brunswick. Porter was required to purchase 99%, and Pro-Line's contract contained a 50% market share threshold. The boat builders' expert testified that these companies made up about 5% of the stern drive engine market. *See* Tr. at 1179.

Brunswick's market share to approximately 50%. Brunswick began exploring its competitive options, and in December 1986 it purchased two of the largest boat builders, U.S. Marine (Bayliner) and Ray Industries (Sea Ray).[4] These purchases were noted throughout the boating industry. Brunswick hoped this vertical integration would enable it to synthesize engine manufacturing and boat building, leading to a higher quality and less expensive product.

Other events occurred about this time which improved Brunswick's competitive position. OMC's success with the Cobra was short lived because the company began receiving complaints that the engine's shift cable was defective. After a year investigating complaints, OMC was forced to recall all of its Cobra engines in 1989. This resulted in significant market share gains by Brunswick. Brunswick also experienced a market share gain in 1993 as a result of mistakes made by Volvo and OMC when they merged, leading to decreased consumer confidence in their products. In 1994 Yamaha, another stern drive engine manufacturer, left the market. The price of Brunswick's stern drive engine increased between 1986 and 1997 from $4775 to $4984, fluctuating both upward and downward in the interim.

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[4] Brunswick also made several other acquisitions that were not part of the main focus of the boat builders' Clayton Act claims. In 1987 it made a small asset purchase from BMW Marine Diesel, a European diesel engine manufacturer; Brunswick hoped this would enable it to compete with Volvo in Europe. *See* Tr. at 4552. In 1990 it acquired Kiekhaefer Aeromarine, which annually produced about sixty high performance stern drive engines that were priced at more than $50,000. Neither of these acquisitions involved products that competed in the relevant market, nor did they occur during the limitations period. *See* discussion Part III.A. The boat builders characterized both companies as "small players" in their closing argument at trial. *See* Tr. at 6632. In 1995 Brunswick bought boat builder Baja Cruisers which had 2.8% of the stern drive engine market; the boat builders' expert testified that Baja was not really a significant player in the market. *See id.* at 1178, 1189.

B.

The boat builders filed this antitrust suit in 1995, more than ten years after Brunswick and other stern drive engine manufacturers first instituted market share discount programs, and over nine years after Brunswick acquired Bayliner and Sea Ray. They alleged that Brunswick had violated Section 7 of the Clayton Act by acquiring Bayliner and Sea Ray in 1986 and subsequently holding them, enabling Brunswick to create a monopoly in the stern drive engine market. They contended that Brunswick had used its market share discounts, volume discounts, and long term discounts and contracts, coupled with the market power it had achieved in purchasing Bayliner and Sea Ray, to restrain trade and to monopolize the market in violation of Sections 1 and 2 of the Sherman Act. According to the boat builders, Brunswick's monopolization of the market enabled it to charge supracompetitive high prices for their engines, which drove other engine manufacturers out of business. The boat builders also claimed that Brunswick had fraudulently concealed both the special deals that they gave to certain boat builders and the stern drive engine that Bayliner was developing.

Brunswick denied the allegations and counterclaimed against several of the boat builders, alleging that they had conspired to boycott Brunswick engines at industry boat shows and to price Brunswick engines higher than competitors' engines in violation of Section 1 of the Sherman Act. Brunswick also brought three state law counterclaims against two of the boat builders, alleging that they had submitted falsified market share affidavits.

Both sides filed pretrial motions, including Brunswick's motion in limine to limit the testimony of Dr. Robert Hall, the expert witness for the boat builders. Brunswick argued that Dr. Hall's economic model was unreliable and did not have the capacity to distinguish between lawful and unlawful

market behavior; his opinion therefore could not provide the jury with an adequate basis to assess antitrust liability or damages. At a pretrial *Daubert* hearing,[5] the boat builders assured the district court that Dr. Hall's testimony and economic model would segregate unlawful conduct by Brunswick from lawful behavior that had contributed to its market share. The district court did not make specific findings regarding Dr. Hall's methodology or the bases of his opinions, but it ruled that the jury could draw its own conclusions about the value of his testimony.

During the course of the ten week trial, both parties called numerous witnesses and presented over 800 exhibits, including voluminous economic data, charts and graphs made in the course of business and for trial purposes, internal business memoranda, consultants' reports, deposition testimony, and much more. The boat builders called over 30 witnesses, many of whom testified by videotaped deposition. Among these witnesses were owners of some of the plaintiff boat building companies, as well as several current and former Brunswick employees. Brunswick called some 15 witnesses, including its own employees and owners of boat building companies and boat dealerships. Expert witnesses presented differing interpretations of stern drive engine market events and of Brunswick's conduct in that market.

The boat builders' primary evidence to establish Brunswick's antitrust liability was presented by their sole expert, Dr. Hall, a professor of economics at Stanford University. He testified that Brunswick had monopoly power in the stern drive market that enabled it to use its market share discount programs to impose a "tax" on boat builders and dealers who chose to purchase engines from other manufacturers. He defined the "tax" as the discount these

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[5] *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

purchasers gave up by not buying from Brunswick. He stated that Brunswick's program effectively required its competitors to charge substantially lower prices in order to convince customers to purchase from them and forgo the discount. Dr. Hall further testified that the discount programs, combined with the market power Brunswick acquired by purchasing Bayliner and Sea Ray, enabled Brunswick to capture 78% of the stern drive engine market. According to Dr. Hall, other manufacturers could not enter into stern drive engine manufacturing as a result of Brunswick's having such a high percentage of the market. He concluded that the discount programs were anticompetitive.

In support of the boat builders' damage claim, Dr. Hall relied on the Cournot model of economic theory that posits that a firm "maximizes its profits by assuming the observed output of other firms as a given, and then equating its own marginal cost and marginal revenue on that assumption." 4 Phillip E. Areeda et al., Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 925a (rev. ed.1998). Dr. Hall postulated that in a stern drive engine market that was competitive, Brunswick and some other firm would each maintain a 50% market share. Under this theory, any market share over 50% would be evidence of anticompetitive conduct on Brunswick's part. Since Brunswick at various points in time had garnered a market share as large as 78% percent [sic], Dr. Hall concluded that it had engaged in anticompetitive conduct and that the boat builders had been overcharged at the moment Brunswick's market share surpassed the 50% threshold.

Brunswick moved for judgment as a matter of law at the close of the boat builders' case. The district court heard arguments on the motion but declined to rule on it at that stage. Brunswick then called its various witnesses, including two expert witnesses. Dr. Frederick Warren-Boulton, former chief economist for the Antitrust Division of the United

States Department of Justice, testified that Brunswick's discount programs served efficiency and business purposes by improving the predictability of engine demand and by helping to keep manufacturing costs to a minimum. He explained that the discount programs encouraged competition in the boat building industry by providing discounts to smaller boat builders who otherwise would not be able to order sufficient quantities of engines to qualify for strict volume discounts. Dr. Richard Rapp, an economist who is president of National Economic Research Associates, testified that there was no rational basis by which Dr. Hall's model could identify alleged overcharges. He pointed out that the Hall model used a mechanical formula to determine Brunswick's alleged overcharge percentage for any year. The only independent variable in the formula was Brunswick's stern drive market share. *See* Tr. at 5288-91. According to the formula, an overcharge was calculated anytime Brunswick's market share surpassed 50%. *See id.* The price at which Brunswick sold its engines was therefore irrelevant for purposes of the formula because the overcharge amount was related solely to Brunswick's market share. *See id.*

The case was submitted to the jury with a detailed verdict form divided into a number of sections.[6] The jury deliberated for a day and a half before returning its verdict. It found that Brunswick had violated three antitrust statutes, Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. The jury awarded a total of $44,371,761 in answer to a question that asked it to assess the individual damages suffered by each boat builder as a result of Brunswick's "antitrust violation or violations." Although the jury found liability for all three antitrust claims, the form of the verdict did not require it to specify what amount of damages was caused by

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[6] A copy of the verdict form with the jury's answers is attached to this opinion. *See* Appendix.

each type of antitrust violation. The jury was asked, however, to consider damages for three separate time periods: one ending December 7, 1991,[7] one from that date to the day of the verdict, and one for the post verdict period. It found damages only for the period starting December 7, 1991, and running to June 19, 1998, the date of the verdict. It rejected the boat builders' fraudulent concealment claim, which would have extended the four year limitations period, by awarding no damages for the period before December 7, 1991. The jury also found for the boat builders on Brunswick's counterclaim for unreasonable restraint of trade in violation of Section 1 of the Sherman Act and for state law violations.

C.

Both sides filed post trial motions. Brunswick moved for judgment as a matter of law on Count 1 of its counterclaim, alleging that the boat builders had engaged in a per se unlawful conspiracy to boycott its engines at industry boat shows and to price its engines at a disadvantage to its competitors. The boat builders filed a protective motion for judgment as a matter of law on Brunswick's counterclaim in the event the court were to overturn the jury verdict. The district court granted Brunswick's motion on Count 1 of its counterclaim, concluding as a matter of law that the boat builders had committed a per se violation of Section 1 of the Sherman Act. It awarded Brunswick only nominal damages of $1, however, because of a failure of proof. The boat builders filed a renewed motion for judgment as a matter of law, or alternatively for reconsideration of the order granting Brunswick judgment on its antitrust counterclaim. This motion was denied, and neither side has appealed the final resolution of Brunswick's counterclaim.

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[7] December 7, 1991 was four years before the day on which this action was filed, December 7, 1995.

Brunswick also filed a renewed motion for judgment as a matter of law and for a new trial on the boat builders' claims. In support of its motion for judgment, Brunswick attacked both the jury's finding of liability and its calculation of damages. It contended that Dr. Hall's testimony should have been limited by the court because his opinion had no basis in the economic reality of the stern drive engine market. Brunswick further claimed that his model was flawed because it failed to account for market share gains that resulted from lawful competitive activity and from market events unrelated to its conduct. Brunswick argued that the jury adopted all aspects of Dr. Hall's presentation and theory and thus awarded damages for losses due to factors other than any anticompetitive conduct. Brunswick also argued that its market share discount programs were not anticompetitive because they were above cost and were not unlawfully exclusionary. Finally, Brunswick contended that the boat builders had not presented sufficient evidence to sustain the jury's verdict on any of their claims and that the Clayton Act claims were barred by the statutory limitations period. Brunswick's motion for a new trial raised many of the same issues. It argued that the jury verdict went against the weight of the evidence, that the damages awarded were grossly excessive, that Dr. Hall's testimony was unfairly prejudicial, and that the plaintiffs were awarded damages for conduct that was not anticompetitive. The district court denied both motions.

The boat builders filed a motion for equitable relief seeking orders to divest Brunswick of Bayliner and Sea Ray,[8] to

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[8] In denying equitable relief to the boat builders, the district court indicated that they had asked for an "order that Brunswick divest itself within twelve months of its U.S. Marine [Bayliner] and Sea Ray boat manufacturing divisions . . . ." Order of Oct. 16, 1998 at 7. The boat builders apparently had not specifically requested divestiture of Baja, which was being operated as part of the Sea Ray division. The court held that "[i]n light of the record as a whole, the balance of equities precludes

proscribe Brunswick's use of market share discount programs, and to prohibit it from further violation of the antitrust laws. The district court also denied this motion. It ruled that the boat builders' request for divestiture was barred by laches in light of the jury's finding of no damages prior to December 7, 1991 and that the balance of equities precluded any order to divest. It also refused to enjoin market share discount programs, again citing laches and no showing of irreparable harm. Finally, the court rejected the boat builders' request to enjoin Brunswick from violating assorted antitrust laws on the grounds that such an injunction would be imprecise, impossible to monitor and enforce, and so broad that it potentially could preclude Brunswick from engaging in legitimate business activity.

Following its rulings on the various post trial motions, the district court trebled the damages found by the jury and awarded the boat builders $7,783,223.94 in attorney fees and $1,267,424.18 in costs. *See Concord Boat Corp. v. Brunswick Corp.*, 34 F.Supp.2d 1125, 1134 (E.D.Ark.1998). The final award totaled $142,165,931.12.

II.

Brunswick argues on appeal that it is entitled to judgment as a matter of law because the boat builders' Clayton Act claims were barred by the statute's four year limitations period and because the evidence was insufficient as a matter of law to enable a reasonable jury to find that Brunswick's discount programs and acquisitions restrained trade and monopolized the market in violation of the Sherman Act. Brunswick contends that above cost discounting and vertical integrations constitute competitive business behavior that should be encouraged because of the resulting benefits for

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any award of divestiture, including the divestiture by Brunswick of Baja . . . ." *Id.* at 13 (emphasis in original).

consumers and purchasers.[9] It also claims that Dr. Hall's testimony should not have been admitted because his approach did not provide a reasonable basis for either liability or damages. His opinion that competitive conduct would have resulted in a "50-50 lockstep duopoly" in the market was without factual support, wholly speculative, and methodologically unsound according to Brunswick. *See* Def.'s Br. at 61. In support of its motion for a new trial Brunswick says that the boat builders' Clayton Act claims were not timely filed, that it is not possible to know what part of the antitrust damages awarded by the jury resulted from the Clayton violations it found, and that Dr. Hall's expert opinion should not have been admitted.

The boat builders contend that their evidence was sufficient to permit a reasonable jury to find that Brunswick had used its discounts and acquisitions to restrain trade and monopolize the market in violation of the Sherman Act. They claim that they proved that Brunswick's monopolization of the engine market resulted in higher engine prices which forced its primary rivals, Volvo and OMC, to merge in 1993 and resulted in Yamaha's departure from the market in 1994. They also argue that the statute of limitations does not bar their Clayton Act claims because Brunswick's purchases of Bayliner and Sea Ray were part of a continuing violation and because their damages were only speculative during the limitations period. They also contend that there was no need

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[9] The National Association of Manufacturers (NAM) has submitted an amicus curiae brief supporting Brunswick's position that this type of discount program results in lower prices for consumers. NAM's 14,000 member companies and subsidiaries, which include 10,000 small manufacturers, employ approximately 85% of all manufacturing workers in the United States and produce over 80% of the nation's manufactured goods. *See* Amicus Curiae Br. for the National Association of Manufacturers at 1. It states that this case has significant implications for potential antitrust liability for its members should they choose to offer above cost, non exclusive discounts to consumers. *See id.* at 2.

for the jury to be asked to tie any damages to a particular type of antitrust violation and that the damage award can be sustained if any of their antitrust claims are upheld. Finally, the boat builders cross appeal from the denial of their motion for equitable relief, but they do not appeal the jury's rejection of their fraudulent concealment claim.

We review de novo the denial of a motion for judgment as a matter of law, using the same standards as the district court. *See Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1505 (8th Cir.1992), *cert. denied*, 506 U.S. 1080, 113 S.Ct. 1048, 122 L.Ed.2d 356 (1993). Judgment as a matter of law is appropriate "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party . . . ." Fed.R.Civ.P. 50(a)(1). We "must assume as proven all facts that the nonmoving party's evidence tended to show, give her the benefit of all reasonable inferences, and assume that all conflicts in the evidence were resolved in her favor." *Hathaway v. Runyon*, 132 F.3d 1214, 1220 (8th Cir.1997). Applying this standard, the motion "must be granted when the non-movant's case rests solely upon speculation and conjecture lacking in probative evidentiary support." *Johnson v. Niagara Mach. & Tool Works*, 666 F.2d 1223, 1225 (8th Cir.1981) (internal quotations and citation omitted). This is because the non-moving party, while entitled to all supportable inferences, is not given "the benefit of unreasonable inferences or those at war with the undisputed facts." *Sip-Top, Inc. v. Ekco Group, Inc.*, 86 F.3d 827, 830 (8th Cir.1996) (citations and internal quotations omitted). A motion for judgment as a matter of law should be granted if, when considering the evidence in this manner, " 'without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict.' " *McGreevy v. Daktronics, Inc.*, 156 F.3d 837, 840 (8th Cir.1998) (citing *Sip-Top, Inc.*, 86 F.3d at 830); *see also Ryther v. KARE 11*, 108 F.3d 832, 844 (8th Cir.) (en banc), *cert. denied*, 521 U.S.

1119, 117 S.Ct. 2510, 138 L.Ed.2d 1013 (1997). We review the denial of a motion for a new trial under an abuse of discretion standard. *See Wood v. Minnesota Mining & Mfg. Co.*, 112 F.3d 306, 311 (8th Cir.1997).

III.

A.

The boat builders claim that Brunswick's purchases of Bayliner and Sea Ray in December 1986 and its continuing holding of them served "substantially to lessen competition, or to tend to create a monopoly" in violation of Section 7 of the Clayton Act. 15 U.S.C. § 18 (1994). Brunswick argues that these claims are barred by the statute's limitations period and that its acquisitions were not anticompetitive as a matter of law. Section 7 of the Clayton Act protects against more than one type of anticompetitive conduct, but all cases are governed by the limitations period in Section 4B that requires that an action be commenced "within four years after the cause of action accrued." 15 U.S.C. § 15b (1994).

Section 7 "is primarily aimed at arresting, at their incipiency, acquisitions and mergers that substantially lessen competition or tend to create a monopoly." *Midwestern Mach., Inc. v. Northwest Airlines, Inc.*, 167 F.3d 439, 442 (8th Cir.1999) (citing *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957)). An antitrust cause of action generally "accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971). A Section 7 action challenging the initial acquisition of another company's stocks or assets accrues at the time of the merger or acquisition. *See Midwestern Mach., Inc.*, 167 F.3d at 442-43. Brunswick acquired Bayliner and Sea Ray in December 1986, and the cause of action for these widely publicized transactions accrued at that time. The

statute's four year limitations period for the initial acquisitions therefore expired in 1990. Since this action was not filed until 1995, Section 7 claims based on Brunswick's initial acquisitions are time barred.

Clayton Act claims are not limited to challenging the initial acquisition of stocks or assets, however, since " 'holding as well as obtaining assets' is potentially violative of section 7." *Midwestern Mach., Inc.*, 167 F.3d at 443 (quoting *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 240, 95 S.Ct. 926, 43 L.Ed.2d 148 (1975)). A Clayton Act violation may occur " 'at or any time after the acquisition, depending upon the circumstances of the particular case .' " *Id.* (quoting *E.I. du Pont de Nemours & Co.*, 353 U.S. at 597, 77 S.Ct. 872). "[W]hile the primary thrust of § 7 is to prohibit and thus to forestall anti-competitive and monopolistic acquisitions," completed acquisitions and "post-acquisition conduct may amount to a violation of § 7." *Id.* (internal quotations and citations omitted). The rationale for extending Section 7 liability beyond the acquisition itself is that " 'as a practical matter it often may be difficult to foresee and evaluate the real impact and effect of an acquisition until the transaction has been completed and the aggregate combine is operating.' " *Id.* at 442-43 (quoting *Carlson Cos. v. Sperry & Hutchinson Co.*, 507 F.2d 959, 962 (8th Cir.1974)).

Section 7 actions challenging the holding or use of assets remain subject to the four year limitations period, and the normal antitrust accrual rule applies. The limitations period thus starts to run at "the point the act first causes injury." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 190-91, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997) (citing *Zenith Radio Corp.*, 401 U.S. at 339-40, 91 S.Ct. 795); *E.I. du Pont de Nemours & Co.*, 353 U.S. at 598, 77 S.Ct. 872 (action accrues when "threat of the prohibited effects is evident"); *ITT Continental Baking Co.*, 420 U.S. at 242, 95 S.Ct. 926 (antitrust action accrues later when there is "no realistic threat of restraint of

commerce or creation of a monopoly" at the initial acquisition); *Midwestern Mach., Inc.*, 167 F.3d at 442 n. 3 (sweep of Section 7 claims restricted by the statute of limitations, laches, and problems of proof and causation). The statute can be tolled under certain circumstances, such as where a defendant has engaged in fraudulent concealment, *see Kansas City, Mo. v. Federal Pacific Elec. Co.*, 310 F.2d 271 (8th Cir.), *cert. denied*, 371 U.S. 912, 83 S.Ct. 256, 9 L.Ed.2d 171 (1962), or where a plaintiff's damages are only speculative during the limitations period, *see Zenith Radio Corp.*, 401 U.S. at 338-42, 91 S.Ct. 795.

The record indicates that the boat builders did not prove that the statute of limitations was tolled or that the limitations period was extended, unlike the plaintiffs in *Midwestern Machinery, E.I. du Pont de Nemours & Company*, and *ITT Continental Baking Company* . [sic] The limitations period in this case cannot be extended on the basis of the holding and use of the acquisitions because the evidence at trial showed that the boat builders' injury accrued in 1986. Brunswick's purchases of Bayliner and Sea Ray were public information at the time of acquisition and were well known throughout the boat manufacturing industry. *See* Tr. at 1929. At trial the boat builders provided the jury with damage calculations for each year beginning in 1986, and these calculations were based solely on Brunswick's market share. This showed that the damages resulting from any injury based on Brunswick's holding and use of Bayliner and Sea Ray could have been quantified as early as 1986. Brunswick's market share was the only independent variable in the boat builders' damage formula, and it was easily calculable at that time. Moreover, in 1990 the boat builders' buying cooperative, Independent Boat Builders, Incorporated (IBBI), advised its members to declare Brunswick's practices "in violation of the Sherman Anti-Trust Act." Def.'s Ex. 318. This advice would have alerted the boat builders to investigate whatever violations of

the antitrust laws might have been committed by Brunswick's holding and use of the companies it had acquired.

Thus, by 1990 at the very latest the boat builders were aware of their alleged injuries and of their potential Section 7 claims with regard to Brunswick's holding and use of Bayliner and Sea Ray. As the Seventh Circuit has noted,

> the statute of limitations is not tolled simply in order to wait and see just how well the defendant does in the market from which he excluded the plaintiff. Otherwise it would be tolled indefinitely in a very large class of antitrust suits.

Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 271 (7th Cir.1984), *cert. denied*, 472 U.S. 1018, 105 S.Ct. 3480, 87 L.Ed.2d 615 (1985). If the rule were different, a merger or acquisition could be subject to continual challenge under Section 7. *See Midwestern Mach., Inc.*, 167 F.3d at 442 n. 3.

The boat builders also claim that Brunswick's holding of Bayliner and Sea Ray resulted in a continuing violation, but they cite no appellate decision applying that concept in a Section 7 case. Continuing violations typically arise in the context of Sherman Act or RICO [10] claims where multiple defendants are alleged to be part of an ongoing conspiracy. *See, e.g., Zenith Radio Corp.*, 401 U.S. at 338, 91 S.Ct. 795 (Sherman Act conspiracy); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n. 15, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968) (Sherman Act refusal to deal); *Grand Rapids Plastics, Inc. v. Lakian*, 188 F.3d 401, 406 (6th Cir.1999), *petition for cert. filed*, 68 U.S.L.W. 3491 (U.S. Nov. 10, 1999) (No. 99-1232) (Robinson-Patman price discrimination scheme); *Hugh Chalmers Motors, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 184 F.3d 761, 763 (8th Cir.1999), *cert. denied*, —U.S.—, 120 S.Ct. 1162, 145

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[10] *See* Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 (1994).

L.Ed.2d 1073 (1999) (No. 99-934) (antitrust conspiracy involving product tying, price discrimination, restraint of trade, and monopolization). In such a situation, the statute of limitations runs from the last "overt act." *Grand Rapids Plastics, Inc.*, 188 F.3d at 406 (internal quotations and citation omitted). Continuing violations have not been found outside the RICO or Sherman Act conspiracy context, however, because acts that "simply reflect or implement a prior refusal to deal or acts that are merely unabated inertial consequences (of a single act) do not restart the statute of limitations." *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 467-68 (6th Cir.1996) (citations and internal quotations omitted).

Even if a continuing violation analysis were applicable to the Section 7 claims here, the boat builders have not shown any overt act that would restart the limitations period. The holding or use of assets is by its nature an "unabated inertial consequence[ ]" of the initial acquisition. *DXS, Inc.*, 100 F.3d at 467 (internal quotations and citations omitted). Where a company is merely holding or using assets in the same manner as at the time of acquisition, there is no "separate new overt act" to restart the limitations period as is found, for example, in each new sale by a Sherman Act price fixing defendant. *Cf. Klehr*, 521 U.S. at 189, 117 S.Ct. 1984. Rather than engaging in another sale or overt act, this type of defendant simply continues to hold or use an asset. If this were enough to make out a continuing violation, there would in effect be no statute of limitations since a Section 7 challenge to the holding or use of assets could be brought at any time. The policy reasons for the four year statutory limitations period for acquisition claims have been discussed by the Ninth Circuit:

> [t]he four-year limitation of Clayton Act § 4B for private antitrust actions for damages is long enough to enable potential plaintiffs to observe the actual effects of a

> possible antitrust violation and to calculate its potential effects. The abuses which would occur if plaintiffs were permitted to search the history of other firms and challenge at their pleasure any possible violations, no matter how old, seem apparent.

International Tel. & Tel. Corp. v. General Tel. & Elecs. Corp., 518 F.2d 913, 929 (9th Cir.1975), *overruled on other grounds, California v. American Stores Co.*, 495 U.S. 271, 110 S.Ct. 1853, 109 L.Ed.2d 240 (1990).

The boat builders rely on a civil RICO case and two district court cases in arguing that a continuing violation can be found in the Section 7 context. *See Klehr*, 521 U.S. at 189, 117 S.Ct. 1984; *see also Telectronics Proprietary, Ltd. v. Medtronic, Inc.*, 687 F.Supp. 832, 842-44 (S.D.N.Y.1988); *Julius Nasso Concrete Corp. v. DIC Concrete Corp.*, 467 F.Supp. 1016, 1022-25 (S.D.N.Y.1979). In *Klehr* the Supreme Court considered the four year antitrust limitations period in deciding when a RICO cause of action accrues and the limitations period starts to run:

> Antitrust law provides that, in the case of a "continuing violation," say, a price fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, "each overt act that is part of the violation and that injures the plaintiff," *e.g.*, each sale to the plaintiff, "starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times."

Id. at 189, 117 S.Ct. 1984 (internal quotations and citations omitted). The Court cited only Sherman Act cases, however, and did not discuss Section 7 Clayton claims. Although the boat builders contend that "[n]umerous courts have applied *Zenith* to Clayton § 7 actions and held that the cause of action accrues each time an injury is incurred," Pls.' Br. at 58, neither of the cited district court cases discussed continuing

injuries. Those plaintiffs instead alleged that merged companies began holding or using assets differently at some time after the acquisitions and that this subsequent change affected the running of the limitations period. Here, however, the boat builders never pointed to evidence showing that Brunswick was holding or using Bayliner and Sea Ray differently than when it originally acquired them, and the continuing violation exception to the limitations period does not apply to save their Section 7 claims from being time barred.

Giving the boat builders the benefit of all reasonable inferences from the evidence, their alleged Section 7 injuries accrued at the latest in 1990 and their damages were then calculable. The four year statute of limitations started to run at that time and expired no later than 1994. Their action was not filed until December 7, 1995, and they have not shown that the statute was tolled or that the continuing violation exception applies. Their Section 7 claims are therefore time barred. Since the statute of limitations had run on the Section 7 claims, they should not have been submitted to the jury and Brunswick is entitled to judgment as a matter of law with respect to them.

B.

The parties disagree about what impact dismissal of the Clayton Act claims should have on the case on appeal since the verdict form did not ask the jury to allocate damages to each type of antitrust claim or to consider what damages were caused by each type of violation.

Brunswick believes it is entitled to a new trial on any remaining claims because the jury was not asked to specify the damages attributable to the individual theories of liability. It cites several Supreme Court and appellate decisions in support. In *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459-60, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993), the Supreme Court overturned a Section 2 antitrust judgment

because there was no way to know whether the jury had relied on an erroneously submitted claim in setting damages. Similarly in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30, 82 S.Ct. 1130, 8 L.Ed.2d 305 (1962), the Court set aside an antitrust judgment where one theory of liability should not have been submitted to the jury. Many other cases have reached similar results if a jury might have relied on erroneously submitted claims. *See, e.g., Robertson v. Norton Co.*, 148 F.3d 905, 908 (8th Cir.1998); *Dakota Indus., Inc. v. Ever Best Ltd.*, 28 F.3d 910, 912 (8th Cir.1994); *Dudley v. Dittmer*, 795 F.2d 669, 673 (8th Cir. 1986); *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 94-95 (2d Cir.1981), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1438, 71 L.Ed.2d 654 (1982); *see also Barber v. Whirlpool Corp.*, 34 F.3d 1268, 1278 (4th Cir.1994).

The boat builders argue that the entire damage award may be upheld even when based on Brunswick's Sherman Act liability alone, but they provide no persuasive authority for their theory. They cite a civil rights case dealing only with alternate grounds for summary judgment, *see Duffy v. Wolle*, 123 F.3d 1026, 1035 n. 5 (8th Cir.1997), *cert. denied*, 523 U.S. 1137, 118 S.Ct. 1839, 140 L.Ed.2d 1090 (1998), and a distinguishable antitrust case, *see General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 800-01 (8th Cir.1987). *Hartz* upheld a judgment on Section 2 grounds despite the erroneous submission of a Section 1 claim to the jury, but there the appellant had not challenged the form of special verdict or objected to it at trial. *See Hartz*, 810 F.2d at 801. Here, Brunswick alerted the district court at trial to the problems with the general verdict form and specifically objected to it on the grounds that it did not "account for the disaggregation principles that need to be addressed by the jury in order that the Court and, if necessary, the Court of Appeals can determine which conduct the jury thought was lawful versus which conduct was unlawful . . . ." Tr. at 6316-26. Moreover, the claims in *Hartz* were all brought under

the Sherman Act; Section 7 of the Clayton Act was not implicated.

This case is like *Spectrum Sports* and *Sunkist Growers*, in that the jury considered an erroneously submitted claim in determining its verdict on damages. It found Brunswick liable for violating Section 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act, but it is not possible to know what damages it found to have been caused by the acquisitions upon which the Section 7 claims were based. The verdict form did not require the jury to consider what damages resulted from each type of violation. *See Barber*, 34 F.3d at 1278. The jury could have assigned millions of dollars in damages to a claim that should not have been submitted in the first instance because of the statute of limitations. Had the verdict form included a damage question for each of the three statutory claims, it would have been possible to deduct from the total damage figure the amount awarded for the Section 7 claim. *See Mueller v. Hubbard Milling Co.*, 573 F.2d 1029, 1038 n. 13 (8th Cir.), *cert. denied*, 439 U.S. 865, 99 S.Ct. 189, 58 L.Ed.2d 174 (1978) (special verdicts especially suited to multiple theories of liability).

Because there is no way to know what damages the jury assigned to the Section 7 claims based on the verdict form that was used, Brunswick would be entitled at the very least to a new damages trial on the boat builders' Sherman Act claims.

IV.

Brunswick argues that another trial on the boat builders' Sherman Act claims is not required because it is entitled to judgment as a matter of law on those claims and the district court erred in not granting its motion for judgment. Brunswick contends that its discount programs and acquisitions represented pro competitive business conduct that did

not unreasonably restrain trade or monopolize the market. The boat builders therefore did not suffer any antitrust injury, and they have not shown causation or damages. The boat builders respond that Brunswick's discount programs amounted to de facto exclusive dealing and its acquisitions enabled it to foreclose a substantial share of the stern drive engine market and to charge supracompetitive high prices for its engines.

The boat builders' antitrust allegations claim damages based on the combined effect of Brunswick's market behavior over some ten years. Under federal law treble damages are available to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." 15 U.S.C. § 15 (1994). In order to prevail plaintiffs must prove for each claim " 'an antitrust violation, the fact of damage or injury, a causal relationship between the violation and the injury, and the amount of damages.' " *Amerinet, Inc.*, 972 F.2d at 1490 (quoting *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1146 (8th Cir.1981), *cert. denied*, 457 U.S. 1111, 102 S.Ct. 2915, 73 L.Ed.2d 1321 (1982)); *see also Green v. Associated Milk Producers, Inc.*, 692 F.2d 1153, 1157 (8th Cir.1982). Antitrust injury, causation, and damages all are necessary parts of the proof because "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262-63 n. 14, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972).

Because the boat builders presented the same evidence for their Section 1 and 2 claims, relying primarily on Dr. Hall to present the key evidence to support their theories of liability and causation, we examine Dr. Hall's presentation first and then turn to the separate antitrust claims.

A.

Brunswick argues that Dr. Hall's expert opinion should have been excluded because it was contrary to undisputed record evidence and because it did not separate lawful from unlawful conduct. The district court recognized that

> the task Dr. Hall faced in analyzing this case was an enormous one. Notwithstanding the complex nature of the conduct at issue, Dr. Hall was required to construct a hypothetical market, a "but for" market, free of the restraints and conduct alleged to be anticompetitive. The difficulty of such a task has long been recognized by courts in antitrust cases . . . .

Concord Boat Corp. v. Brunswick Corp., 21 F.Supp.2d 923, 927 (E.D.Ark.1998). Despite the inherent difficulty of the task, counsel for the boat builders assured the district court before trial that Dr. Hall's model would reflect the reality of the market and would segregate any lawful acts and unrelated market events that might have contributed to Brunswick's market share from any anticompetitive conduct in order to enable the jury to assign damages only for illegal actions taken by Brunswick.

Counsel's assurances did not eliminate the need for a thorough analysis of the expert's economic model and his proffered opinion. Under *Daubert* the district court is to make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93, 113 S.Ct. 2786. Among the factors to consider is whether the " 'expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.' " *Id.* at 591, 113 S.Ct. 2786 (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir.1985)). The Court referred to this requirement as "fit,"

meaning that the expert testimony must not only be based on reliable science but must also "fit" the particular facts of the case. *See id.*

In recent years the Supreme Court has put renewed emphasis on the importance of the "fit" of an expert's opinion to the data or facts in the case:

> [C]onclusions and methodology are not entirely distinct from one another. . . . [N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytic gap between the data and the opinion proffered.

General Elec. Co. v. Joiner, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997); *see also Jaurequi v. Carter Mfg. Co.*, 173 F.3d 1076, 1082 n. 3 (8th Cir.1999). A court must focus on the "reasonableness of using such an approach, along with [the expert's] particular method of analyzing the data thereby obtained, to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant.*" *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 154, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (emphasis in original).

The district court commented that because Brunswick had not challenged the Cournot model as a scientific theory, its "criticisms are reduced to complaints about how Dr. Hall applied the Cournot model to the facts of this case." *Concord Boat Corp.*, 21 F.Supp.2d at 934. If a party believes that an expert opinion has not considered all of the relevant facts, an objection to its admission is appropriate. *See Kumho Tire Co.*, 526 U.S. at 154, 119 S.Ct. 1167; *Joiner*, 522 U.S. at 146, 118 S.Ct. 512. Even a theory that might meet certain *Daubert* factors, such as peer review and publication, testing, known

or potential error rate, and general acceptance,[11] should not be admitted if it does not apply to the specific facts of the case. *See Kumho Tire Co.*, 526 U.S. at 154, 119 S.Ct. 1167; *Joiner*, 522 U.S. at 146, 118 S.Ct. 512.

Not all relevant circumstances were incorporated into the expert's method of analysis related to antitrust liability. Dr. Hall's opinion that Brunswick's discount programs imposed a tax on boat builders who chose to purchase engines from other manufacturers is not supported by the evidence that some boat builders chose to purchase 100% of their engines from Brunswick when they only needed to purchase 80% to qualify for the maximum discount.[12] If Brunswick's market share had enabled it to charge supracompetitive high prices for its engines, presumably none of the boat builders would have chosen to purchase more than the minimum percentage required to receive the discount. There was other evidence that the boat builders were not unable to forgo Brunswick's discounts. For example, the boat builders wielded sufficient power over Brunswick to force it to scuttle its 1994 "Industry Growth Program," which would have raised the market share requirement to 95%, and their reaction led to a reduction in market share levels for the 1995 to 1997 model year program.

Dr. Hall used the Cournot model to construct a hypothetical market which was not grounded in the economic reality of the stern drive engine market, for it ignored inconvenient evidence. The basis for his model was a theoretical situation in which some other manufacturer's

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[11] It is not clear how often the Cournot model has been employed in antitrust cases; a Westlaw search on February 3, 2000 did not find any other federal antitrust case discussing its application.

[12] The owner of Mariah Boats, for example, which was found by the jury to have suffered $16 million of the damages awarded to the boat builders, testified that when Brunswick lowered its market share discount level to 70% in 1994, "it was of no significance [to Mariah] because we were 90-plus anyway." Tr. at 2129.

engine would be viewed as equal in quality to Brunswick's. *See* Tr. at 1351. In this hypothetical market, Dr. Hall assessed an overcharge on each engine sold at any point where Brunswick possessed over the 50% market share he deemed permissible. The overcharge was described as the difference between the actual price paid by the boat builders and the price that would theoretically have existed in a more competitive market. This approach was not affected by the actual price at which Brunswick's engines were sold since the overcharge percentage was applied any time its market share surpassed 50%. As Dr. Hall testified but his opinion did not reflect, Brunswick had achieved a 75% share in the mid 1980s, *before* it started the market share discounts and *before* it acquired Bayliner and Sea Ray. *See* Tr. at 1392.

The model also failed to account for market events that both sides agreed were not related to any anticompetitive conduct, such as the recall of OMC's Cobra engine and the problems associated with the Volvo/OMC merger. Dr. Hall admitted on cross examination that such facts could have been incorporated into his model but that he had not done so:

> I did not numerically attribute—in other words, it wasn't some specific adjustment that you'll see in my computer spread sheet saying, "Here's what I did because of OMC." And that's because of the framework that I was working in. Remember, I was stepping back and saying, "What's a reasonable benchmark for what a freer market would have been?" . . . . Within that framework, there isn't a slot . . . [to get] down into the year by year details.
>
> . . . What I want to do is stand back and say what averaged over the years, with, of course, ups and downs.

Tr. at 1417-18. Dr. Hall testified about OMC's recall of its Cobra engine and admitted that the "decline in OMC's market share and the corresponding increase during this time period of Brunswick's market share is very much related to

the switch-over in engines previously supplied by OMC . . . ." Tr. at 1249. The OMC/Volvo joint venture alone increased Brunswick's market share by as much as 10%. *See* Def.'s Ex. 1207 (letter dated May 21, 1993 from David Ball to IBBI members: Brunswick "picked up over 10 unearned market share points this past year due to the chaos created by the Volvo/OMC joint venture announcement"); Tr. at 4954 (testimony of David Ball, President of IBBI). There was also evidence that the boat builders did not hesitate to switch to OMC and Volvo when they offered superior discounts. *Cf. SMS Sys. Maintenance Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11, 19-20 (1st Cir.1999), *cert. denied*, — U.S. —, 120 S.Ct. 1241, 146 L.Ed.2d 100 (1999) (No. 99-995) (actual behavior of customers more important than "self-serving testimony" of plaintiffs).

Dr. Hall's expert opinion should not have been admitted because it did not incorporate all aspects of the economic reality of the stern drive engine market and because it did not separate lawful from unlawful conduct. Because of the deficiencies in the foundation of the opinion, the expert's resulting conclusions were "mere speculation." *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 69 F.Supp.2d 571, 580 (S.D.N.Y.1999) (summary judgment appropriate on Section 1 and 2 claims because "an expert's opinion is not a substitute for a plaintiff's obligation to provide evidence of facts that support the applicability of the expert's opinion to the case"). Expert testimony that is speculative is not competent proof and contributes "nothing to a 'legally sufficient evidentiary basis.' " *Weisgram v. Marley Co.*, — U.S. —, 120 S.Ct. 1011, 1015, 1020, 145 L.Ed.2d 958 (2000) (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993)). "Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them." *Brooke Group Ltd.*, 509 U.S. at 242, 113 S.Ct. 2578; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 n.

19, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) ("[E]xpert opinion evidence . . . has little probative value in comparison with the economic factors . . . .").

An expert opinion cannot sustain a jury's verdict when it "is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable . . . ." *Brooke Group Ltd.*, 509 U.S. at 242, 113 S.Ct. 2578; *see also Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1108 (8th Cir.1996) (motion for judgment should have been granted because the expert opinion on causation was speculative). An error in admission of evidence is reversible if the ruling affected a substantial right of a party. *See* Fed. R. Ev. 103(a); *see also White v. Honeywell, Inc.*, 141 F.3d 1270, 1275 (8th Cir.1998); *cf.* Fed.R.Civ.P. 61. Here Dr. Hall's expert opinion was the basis of the boat builders' damage case, and the jury clearly relied on his opinion in reaching its verdict because the damages it awarded to the individual boat builders were identical to the detailed figures Dr. Hall had calculated. *Compare* Pls.' Ex. 2556, *and* Tr. at 2608-46, *with* Appendix to this opinion. It cannot be said that the verdict would have been the same without the expert testimony, and its admission affected Brunswick's substantial rights. Brunswick's motion for judgment should have therefore been granted. *See Weisgram*, — U.S. at —, 120 S.Ct. at 1015.

B.

Brunswick argues that it is entitled to judgment as a matter of law on the boat builders' Sherman Act claims because of the improper expert testimony and because the other evidence presented by the boat builders was insufficient to demonstrate antitrust injury, causation, and damage. The boat builders argue that there is more than sufficient evidence in the trial record of Brunswick's anticompetitive conduct to support the jury's finding of liability and damages. Antitrust plaintiffs

must prove an antitrust violation by a preponderance of the evidence. *Cf. Herman & MacLean v. Huddleston*, 459 U.S. 375, 390, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983). After a thorough examination of the record, we find that the boat builders failed to carry their burden of proof and Brunswick's motion for judgment should have been granted for this reason.

1.

Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1 (1994). To prove a Section 1 violation, a plaintiff must show an agreement in the form of a contract, combination, or conspiracy that imposes an unreasonable restraint on trade. *See Willman v. Heartland Hosp. E.*, 34 F.3d 605, 610 (8th Cir.1994), *cert. denied*, 514 U.S. 1018, 115 S.Ct. 1361, 131 L.Ed.2d 218 (1995). The unreasonableness of a restraint is determined using either a per se standard or a standard that examines all of the circumstances, the so-called rule of reason test. *See Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988). Under the per se standard, conduct that is "manifestly anticompetitive" or "would always or almost always tend to restrict competition," *id.* (internal quotations and citation omitted), is conclusively presumed to restrain competition unreasonably " 'without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use.' " *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 461 (3d Cir.1998) (quoting *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958)). Practices that have been held to be illegal per se include price fixing, division of markets, group boycotts, and tying arrangements. *See Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332, 344 n. 15, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982); *Double D Spotting Serv., Inc. v. Supervalu, Inc.*, 136 F.3d 554, 558 (8th Cir.1998).

Because the boat builders have not alleged that Brunswick engaged in activity that would trigger a per se analysis, we apply the rule of reason analysis that focuses on the "particular facts disclosed by the record," *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 467, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) (internal quotations and citation omitted), and "weigh[ ] all of the circumstances . . . in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition," *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

The boat builders' Section 1 theory is that Brunswick violated the law by means of its agreements or contracts. They argue that Brunswick's market share discount programs created an unreasonable restraint of trade in violation of Section 1. *See Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961); *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). It is undisputed that the market share discounts were not exclusive contracts. At most the programs were de facto exclusive dealing arrangements. Dr. Hall testified at trial that the discount programs were "voluntary contracts. Nobody forced the boatmakers individually to accept these. They accepted these contracts because they individually got a deal from it. They got their discounts if they bought a lot of Brunswick engines." Tr. at 1173-74.

Section 1 claims that allege only de facto exclusive dealing may be viable. *See Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1301-02 (9th Cir.), *cert. denied*, 459 U.S. 1009, 103 S.Ct. 364, 74 L.Ed.2d 400 (1982). The principle criteria used to evaluate the reasonableness of a contractual arrangement include the extent to which competition has been foreclosed in a substantial share of the relevant market, the duration of any exclusive arrangement, and the height of entry barriers. *See Tampa Elec. Co.*, 365

U.S. at 327, 81 S.Ct. 623; *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1233-35 (8th Cir.1987), *cert. denied*, 484 U.S. 1026, 108 S.Ct. 751, 98 L.Ed.2d 763 (1988); *see also Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984) (O'Connor, J., concurring) (reasonableness of the restraint on trade in exclusive dealing cases depends upon whether a "significant fraction of buyers or sellers are frozen out of a market").

The boat builders failed to produce sufficient evidence to demonstrate that Brunswick had foreclosed a substantial share of the stern drive engine market through anticompetitive conduct. They also did not demonstrate that Brunswick's discount program was in any way exclusive. The programs did not require the boat builders to commit to Brunswick for any specified period of time. *See Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir.1984) (contracts terminable in less than a year presumptively lawful). They were free to walk away from the discounts at any time, and they in fact switched to OMC engines at various points when that manufacturer offered superior discounts. One of the boat builders' witnesses testified, for example, that he had switched from 80% Brunswick engines to 70-80% OMC engines between 1988 and 1991 because OMC was offering better prices. *See* Tr. at 327. Another witness testified in his deposition that his boat building employer had switched from 90% Brunswick to 80% OMC in 1993 because of OMC's favorable pricing. *See* Def.'s Ex. 3466; *cf. SMS Sys. Maintenance Servs., Inc.*, 188 F.3d at 19-20 (rejecting Sherman Act Section 2 monopolization claim that defendant used generous warranty contracts to lock in customers where the customers' actual behavior indicated they were willing and able to switch to other suppliers).

The boat builders also did not show that significant barriers to entry existed in the stern drive engine market. If entry

barriers to new firms are not significant, it may be difficult for even a monopoly company to control prices through some type of exclusive dealing arrangement because a new firm or firms easily can enter the market to challenge it. *Cf. Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 597-98 (8th Cir.1987), *cert. denied*, 484 U.S. 1010, 108 S.Ct. 707, 98 L.Ed.2d 658 (1988) (predatory price claim rejected where there was no evidence of a "drastically declining price structure" or of increasing concentration in the market (internal quotations and citation omitted)). If there are significant entry barriers in the market, a potential competitor would have difficulty entering in order to challenge a firm that is charging supracompetitive high prices. *See id.* A significant barrier to entry may exist when large amounts of capital would be required. *See Mississippi River Corp. v. F.T.C.*, 454 F.2d 1083, 1092 (8th Cir.1972). The boat builders presented scant evidence that firms have difficulty entering the stern drive engine manufacturing market. They suggest that engine manufacturing is a capital intensive business, but Dr. Hall testified that various companies are capable of assembling stern drive engines and of overcoming whatever entry barriers might exist. He noted that Toyota had entered the market recently and was on its way to competing with established manufacturers like Brunswick and OMC/Volvo. Brunswick's discounts, because they were significantly above cost, left ample room for new competitors such as Toyota to enter the engine manufacturing market and to lure customers away by offering superior discounts.

In sum, the boat builders failed to establish Section 1 violations or a sufficient causal connection between the alleged violations and their injuries. In order to make out their case they had to produce evidence to show that Brunswick's market share discount programs were an unreasonable contractual arrangement, based on the amount of market foreclosure, exclusivity, and the erection of entry barriers. *See Tampa Elec. Co.*, 365 U.S. at 325-29, 81 S.Ct.

623. The boat builders have not shown that a reasonable jury could have found that Brunswick's programs, which were not exclusionary, caused harm in the first instance, or that they were a "material cause" of any harm allegedly suffered. *National Ass'n of Review Appraisers & Mortgage Underwriters, Inc. v. Appraisal Found.*, 64 F.3d 1130, 1135 (8th Cir.1995), *cert. denied*, 517 U.S. 1189, 116 S.Ct. 1676, 134 L.Ed.2d 779 (1996) (summary judgment affirmed where defendant's allegedly anticompetitive conduct was not a material cause of plaintiff's injury); *see also Amerinet*, 972 F.2d at 1494 (summary judgment affirmed where plaintiff failed to provide sufficient evidence of antitrust injury, causation, and damages). The boat builders also failed to account for "numerous intervening economic and market factors which . . . may have been the actual cause of the plaintiffs' injuries," such as market share gains related to competitors' mistakes. *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 402 (7th Cir.1993), *cert. denied*, 510 U.S. 1111, 114 S.Ct. 1054, 127 L.Ed.2d 375 (1994) (summary judgment affirmed where "as a matter of law, plaintiffs have failed to show with a fair degree of certainty that the antitrust violation was a material and substantial factor causing their alleged injuries").

2.

Section 2 of the Sherman Act prohibits "monopoliz[ing], or attempt[ing] to monopolize . . . any part of the trade or commerce among the several States . . . ." 15 U.S.C. § 2 (1994). To establish a Section 2 violation, plaintiffs must show that 1) the defendant possessed monopoly power in the relevant market and 2) the defendant willfully acquired or maintained this monopoly power by anticompetitive conduct as opposed to gaining that power as a result "of a superior product, business acumen, or historical accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *see also Morgan v. Ponder*, 892 F.2d

1355, 1358 (8th Cir.1989). Monopoly power is defined as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 100 L.Ed. 1264 (1956).

The boat builders argue that the discount programs and acquisitions were part of a deliberate plan to exclude competitors from the stern drive engine market, and that this exclusion enabled Brunswick to charge supracompetitive high prices for its engines. As with the Section 1 claim, the boat builders point to evidence they say shows that when Brunswick was threatened in the mid-1980s with OMC's new Cobra engine and with increasing competition from other engine manufacturers, it offered market share discounts and acquired Bayliner and Sea Ray in an effort to avoid competition on the merits. They also allege that Brunswick attempted to erect and maintain barriers to entry and to place its customers in "golden handcuffs," such that boat builders and dealers had no choice but to purchase engines from it.

The Supreme Court "has urged great caution and a skeptical eye when dealing with unfair pricing claims." *Bathke v. Casey's Gen. Stores, Inc.*, 64 F.3d 340, 343 (8th Cir.1995). This is because "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990) (rejecting Section 1 claim that a maximum price fixing conspiracy caused antitrust injury when the prices were fixed above a predatory level). In the absence of predatory prices,[13] any losses caused

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[13] Predatory pricing occurs when " 'a single firm, having a dominant share of the relevant market, cuts its prices in order to force competitors out of the market, or perhaps to deter potential entrants from coming in.' " *Morgan*, 892 F.2d at 1358 (quoting *Matsushita Elec. Indus. Co.*, 475 U.S.

by pricing "cannot be said to stem from an *anticompetitive* aspect of the defendant's conduct. It is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Id.* at 340-41, 110 S.Ct. 1884 (emphasis in original) (internal quotations and citations omitted).

Because cutting prices in order to increase business often is the very essence of competition, which antitrust laws were designed to encourage, it "is beyond the practical ability of a judicial tribunal to control [above cost discounting] without courting intolerable risks of chilling legitimate price cutting." *Brooke Group Ltd.*, 509 U.S. at 223, 113 S.Ct. 2578 (citation omitted); *see also Matsushita Elec. Indus. Co.*, 475 U.S. at 594, 106 S.Ct. 1348 (emphasizing the pro-competitive effect of above cost discounting); *Morgan*, 892 F.2d at 1359-63; *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230-36 (1st Cir.1983). To hold otherwise "would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result . . . ." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986). If a firm has discounted prices to a level that remains

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at 584 n. 8, 106 S.Ct. 1348). Determining whether price cutting is predatory is not a simple inquiry:

> The difficulty, of course, is distinguishing highly competitive pricing from predatory pricing. A firm that cuts its prices or substantially reduces its profit margin is not necessarily engaging in predatory pricing. It may simply be responding to new competition, or to a downturn in market demand. Indeed, there is a real danger in mislabeling such practices as predatory, because consumers generally benefit from the low prices resulting from aggressive price competition.

Morgan, 892 F.2d at 1358-59 (citing *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 231 (1st Cir.1983)). There is no allegation that Brunswick engaged in predatory pricing.

above the firm's average variable cost, "the plaintiff must overcome a strong presumption of legality by showing other factors indicating that the price charged is anticompetitive." *Morgan*, 892 F.2d at 1360. This is because a firm's ability to offer above cost discounts is attributable to "the lower cost structure of the alleged predator, and so represents competition on the merits . . ." *Brooke Group Ltd.*, 509 U.S. at 223, 113 S.Ct. 2578.

The decisions of the Supreme Court in *Brooke Group* and *Matsushita* illustrate the general rule that above cost discounting is not anticompetitive. In *Brooke Group Ltd.* the trial court had granted the defendants' motion for judgment overturning a $49.6 million verdict after a 115 day trial with nearly 3000 exhibits. *See Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 748 F.Supp. 344, 348 (M.D.N.C.1990), *aff'd*, 964 F.2d 335, 336 (4th Cir.1992), *aff'd sub nom., Brooke Group Ltd.*, 509 U.S. at 219, 113 S.Ct. 2578. The plaintiff had failed to demonstrate that the defendants had caused injury to competition. *See Brooke Group Ltd.*, 509 U.S. at 243, 113 S.Ct. 2578. The Court pointed out that

> [a]lthough [the plaintiff's] theory of liability, as an abstract matter, is within the reach of the statute . . . . [The plaintiff] was not entitled to submit its case to the jury. . . . The record in this case demonstrates that the anticompetitive scheme [the plaintiff] alleged, when judged against the realities of the market, does not provide an adequate basis for a finding of liability.

Id. at 230, 113 S.Ct. 2578 (citations omitted). In *Matsushita* the Court remanded a predatory pricing conspiracy case for entry of summary judgment for the defendants unless

> there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that [the defendants] conspired to price predatorily for two decades despite

> the absence of any apparent motive to do so. The evidence must "ten[d] to exclude the possibility" that [the defendants] underpriced [the plaintiffs] to compete for business rather than to implement an economically senseless conspiracy.

Matsushita, 475 U.S. at 597-98, 106 S.Ct. 1348. In both of these cases the Supreme Court put the focus on the actual facts or realities of the marketplace rather than on hypotheticals.

No one argues in this case that Brunswick's discounts drove the engine price below cost, and Brunswick contends that its discounts were therefore per se lawful. The district court questioned Brunswick's per se legality theory, since the boat builders' claim was that Brunswick's conduct as a whole, including the discounts and acquisitions, enabled it to "charge[ ] anticompetitive *high* prices for its engines." *Concord Boat Corp.*, 21 F.Supp.2d at 929 (emphasis in original). The court examined several cases that had "rejected the argument that *any* pricing practice that leads to above costs prices is *per se* lawful under the antitrust laws." *Id.* (emphasis in original); *see LePage's Inc. v. 3M*, No. Civ.A 97-3983, 1997 WL 734005 (E.D.Pa. Nov.14, 1997) (bundling discounts on several product [sic] purchased together); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838, 99 S.Ct. 123, 58 L.Ed.2d 134 (1978) (pricing scheme linking monopolistic product with another competitive product violated Section 2); *Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc.*, 920 F.Supp. 455, 467 (S.D.N.Y.1996) (refusing to dismiss Section 2 bundling claims even though defendant not accused of pricing below cost because "average variable cost is the controlling standard in this Circuit [only for] single product cases"). The cases examined by the district court all involve bundling or tying, however, which "cannot exist unless two separate product markets have been linked." *Jefferson Parish Hosp. Dist. No.*

2, 466 U.S. at 21, 104 S.Ct. 1551. Because only one product, stern drive engines, is at issue here and there are no allegations of tying or bundling with another product, we do not find these cases persuasive.

The boat builders also have not shown that Brunswick's superior market share was achieved or maintained "by means other than the competition on the merits . . . ." *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 522 (5th Cir.1999) (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985)); *see also Grinnell Corp.*, 384 U.S. at 570-71, 86 S.Ct. 1698. A Section 2 defendant's proffered business justification is the most important factor in determining whether its challenged conduct is not competition on the merits. *See Stearns Airport Equip. Co.*, 170 F.3d at 522; *see also Grinnell Corp.*, 384 U.S. at 570-71, 86 S.Ct. 1698. Section 2 claims cannot succeed if a defendant's dominant market share resulted from "a superior product, business acumen, or historical accident." *Grinnell Corp.*, 384 U.S. at 571, 86 S.Ct. 1698. On the other hand, if the conduct "has no rational business purpose other than its adverse effects on competitors, an inference that it is exclusionary is supported." *Stearns Airport Equip. Co.*, 170 F.3d at 522.

Brunswick's business justification in this case is that it was trying to sell its product. *Cf. id.* at 524. Cutting prices is the "very essence of competition." *Matsushita Elec. Indus. Co.*, 475 U.S. at 594, 106 S.Ct. 1348. Brunswick's competitors also cut prices in order to attract additional business, confirming that such a practice was a normal competitive tool within the stern drive manufacturing industry. *See id.; see also Trace X Chem., Inc. v. Canadian Indus., Ltd.*, 738 F.2d 261, 266 (8th Cir.1984), *cert. denied*, 469 U.S. 1160, 105 S.Ct. 911, 83 L.Ed.2d 925 (1985) ("Acts which are ordinary business practices typical of those used in a competitive market do not constitute anti-competitive conduct violative of

Section 2."). In addition, Brunswick's discount programs were not exclusive dealing contracts and its customers were not required either to purchase 100% from Brunswick or to refrain from purchasing from competitors in order to receive the discount (and in fact could purchase up to 40% of requirements from other sellers without forgoing the discount). *See Western Parcel Express v. United Parcel Serv. of Am., Inc.*, 190 F.3d 974, 976 (9th Cir.1999) (affirming summary judgment for defendant in Section 2 predatory pricing and exclusive dealing case where the challenged volume discount contracts were terminable "for any reason with very little notice" and did not foreclose customers from entering into contracts with the defendant's competitors). Boat builders and dealers were free to walk away from Brunswick's discounts at any time, *see id.*, and the evidence showed that they did so when Brunswick's competitors offered better discounts, thus discrediting the boat builders' theory that the discounts created "golden handcuffs" and entry barriers for other engine manufacturers.

C.

Giving the boat builders the benefit to which they are entitled of all legitimate inferences, they did not offer sufficient evidence to enable a jury to determine that Brunswick's market share discount programs and acquisitions were anticompetitive. Even considering the erroneously admitted testimony of Dr. Hall, the boat builders failed to offer a "legally sufficient evidentiary basis for a reasonable jury to find for [them]." *Weisgram*, — U.S. at —, 120 S.Ct. at 1020 (internal quotations and citation omitted). They did not establish antitrust injury or causation with respect to either Sherman Act claim. The boat builders had a "full and fair opportunity to present [their] case," and the record evidence was insufficient to justify the verdict. *Id.* 120 S.Ct. at 1015. Brunswick is therefore entitled to judgment as a matter of law on the Sherman Act claims.

V.

After a careful review of the voluminous record in this case, we conclude that the judgment for the boat builders cannot be upheld and that Brunswick is entitled to entry of judgment in its favor. Since the boat builders did not file their case until more than four years after the accrual of their cause of action under the Clayton Act and no exception to the running of the limitations period applies, the Section 7 claims should have been dismissed rather than submitted to the jury. We also conclude that the boat builders did not make out submissible Sherman Act claims. We therefore reverse and vacate the judgment in favor of the boat builders, including the award of fees and costs, and remand for entry of judgment in favor of Brunswick.[14]

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[14] This resolution moots Brunswick's motion for a new trial, as well as the cross appeal of the boat builders from the denial of their motion for equitable relief, and we need not address these issues further.

APPENDIX

The relevant portion of the verdict form with the jury's answers follows:

PART I — Plaintiffs' Antitrust Claims

1. Do you find from a preponderance of the evidence that Plaintiffs have proved a relevant product market?

   YES √ NO __

2. If you answered "NO" to Question 1 then go to PART II. If you answered "YES" to Question 1, place an "X" next to the following engines that you find by a preponderance of the evidence to be in the relevant product market:

√ stern drive engines
__ outboard engines
√ inboard engines
__ jet engines

3. Do you find from a preponderance of the evidence that Brunswick monopolized that market in violation of Section 2 of the Sherman Act?

   YES √ NO __

4. Do you find from a preponderance of the evidence that Brunswick engaged in an unreasonable restraint of trade in that market in violation of Section 1 of the Sherman Act?

   YES √ NO __

5. Do you find from a preponderance of the evidence Brunswick engaged in acquisitions which had the effect of substantially lessening competition in that market, or tending to create a monopoly in that market, in violation of Section 7 of the Clayton Act?

   YES √ NO __

6. If you answered YES to either question 3, or question 4, or question 5 (or answered yes to more than one of those questions) what, if any, damages did the Plaintiffs suffer (or will suffer) as a result of Brunswick's antitrust violation or violations in that market? Use Chart 1 to fill in the damages, if any, suffered (or to be suffered) by each of the Plaintiffs during each of the following time periods:

   a. *From* December 7, 1991 *through* the date of verdict; and

   b. *After* the date of verdict.

CHART 1

Plaintiff	For Time Period to December 7, 1991	For Time Period December 7, 1991 Through the Date of Verdict	For Time Period After the Date of Verdict
Albemarle Boats, Inc.	$0	$83,282	$0
Armada Manufacturing	$0	$2,646,611	$0
Caravelle Boats, Inc.	$0	$4,887,179	$0
Campion Marine, Inc.	$0	$1,196,286	$0
Century Craft Industries (Vanguard Industries)	$0	$39,168Vanguard $19,348 Century	$0
Concord Boat Corp.	$0	$106,459	$0
F R P Industries	$0	$468,163	$0
G.W. Invader	$0	$460,597	$0
Galaxie Boatworks	$0	$395,362	$0
Harris Kayot	$0	$1,644,706	$0
KCS Internationa	$0	$3,389,006	$0
Malibu Boats	$0	$5,036,468	$0
Mariah Boats, Inc.	$0	$16,626,171	$0
Mirage Boats, Inc.	$0	$824,028	$0
Ohio Marine Dist. (Play Time)	$0	$6,428	$0
Powerquest Boats, Inc.	$0	$2,618,335	$0
Sea Arrow Marine, Inc.	$0	$15,065	$0
Silverton Mar. Corp.	$0	$1,566,672	$0
Thompson Boat Co.	$0	$2,324,365	$0
Weeres Industries	$0	$18,062	$0

7. Do you find by a preponderance of the evidence that one or more Plaintiffs are entitled to recover damages for the time period prior to December 7, 1991?

YES __ NO √

. . . .

PART II Brunswick's Section 1 Counterclaim

10. Do you find by a preponderance of the evidence that any of the Plaintiffs engaged in an unreasonable restraint of trade in violation of Section 1 of the Sherman Act?

YES __ NO √

APPENDIX B

UNITED STATES DISTRICT COURT,
E.D. ARKANSAS,
WESTERN DIVISION

No. LR-C-95-781

CONCORD BOAT CORPORATION, *et al.*,
Plaintiffs,

v.

BRUNSWICK CORPORATION,
Defendant.

Aug. 20, 1998

ORDER

MOODY, District Judge.

Before the Court are Defendant Brunswick Corporation's Renewed Motion for Judgment as a Matter of Law Pursuant to Rule 50(b) of the Federal Rules of Civil Procedure and separate Motion for a New Trial. For the reasons set forth herein, the motions will be DENIED.

I.

Plaintiffs, a group of twenty-one boat manufacturers and their buying cooperative, Independent Boat Builders Incorporated ("IBBI"), brought this action against Brunswick Corporation ("Brunswick") alleging that Brunswick engaged

in a variety of anticompetitive conduct with respect to the market for stern drive and inboard marine engines.[1]

Plaintiffs alleged violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. Specifically, Plaintiffs claimed that Brunswick engaged in a multifaceted anticompetitive scheme that included the following unlawful practices: (1) the use of various exclusionary discount programs in the sale of stern drive and inboard marine engines to boat manufacturers; (2) the use of various exclusionary discount programs in the sale of stern drive and inboard marine engines to boat dealers; (3) the use of long-term contracts in the sale of stern drive and inboard marine engines; (4) the acquisitions of the boat manufacturers Ray Industries (Sea Ray), U.S. Marine (Bayliner), and Baja; and (5) the acquisitions of the engine manufacturers BMW Marine Diesel, Kiekhaefer Aeromarine and Force. Plaintiffs also alleged that Brunswick fraudulently concealed its anticompetitive acts.

Brunswick counterclaimed against the Plaintiffs who purchased stern drive engines, alleging that those Plaintiffs engaged in an unlawful group boycott. Brunswick alleged that Plaintiffs conspired to boycott MerCruiser stern drive engines at industry boat shows and conspired to price MerCruiser engines at a disadvantage to MerCruiser's competitors. Brunswick also brought three state law counterclaims against Plaintiffs G.W. Invader and KCS International relating to the alleged submission of falsified market share affidavits.

The trial commenced on April 13, 1998 and lasted ten weeks. The jury returned a verdict on June 19, 1998, after a day-and-a half of deliberations. The verdict defined the relevant market as the market for stern drive and inboard

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[1] Brunswick manufactures MerCruiser stern drive engines. The Court will refer to "Brunswick" and "MerCruiser" interchangeably.

marine engines. The jury found for Plaintiffs on all three of the antitrust claims, finding that Brunswick had monopolized the market for stern drive and inboard marine engines; that Brunswick engaged in unreasonable restraints of trade in violation of Section 1 of the Sherman Act; and that Brunswick engaged in acquisitions in violation of Section 7 of the Clayton Act. The jury awarded damages of $44.4 Million on the antitrust claims.[2] In addition, the jury returned a verdict for Plaintiffs on Brunswick's antitrust counterclaim and for G.W. Invader and KCS International on the three state law counterclaims.

II.

A motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) poses the legal question as to whether sufficient evidence was presented to support a jury verdict. *Gray v. Bicknell*, 86 F.3d 1472, 1478 (8th Cir.1996). The motion is properly granted only if the nonmoving party has not offered sufficient evidence to support a jury verdict in its favor. *Parrish v. Immanuel Med. Ctr.*, 92 F.3d 727, 731 (8th Cir.1996); *Gray*, 86 F.3d at 1478; *Abbott v. Crocker, Mo.*, 30 F.3d 994, 997 (8th Cir.1994). Before ruling on such a motion, a court must (a) resolve direct factual conflicts in favor of the nonmovant; (b) assume as true all facts supporting the nonmovant that the evidence tended to prove; (c) give the nonmovant the benefit of all reasonable inferences; and (d) deny the motion if the evidence would allow reasonable jurors to differ as to the conclusions that could be drawn. *Parrish*, 92 F.3d at 731; Gray, 86 F.3d at 1478; *Sherlock v. Quality Control Equip.* Co., 79 F.3d 731, 735 (8th Cir.1996). "Judgment as a matter of law is

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[2] The jury rejected Plaintiffs' claim of fraudulent concealment, thus limiting damages to the beginning of the limitations period, December 7, 1991. The jury also rejected Plaintiffs' claims for prospective damages. After trebling, the verdict is approximately $133 Million.

appropriate only when all of the evidence points one way and is susceptible to no reasonable inference sustaining the position of the nonmoving party." *Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095, 1100 (8th Cir.1996) (quoting *Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490, 494 (8th Cir.1996)).

III.

Brunswick argues that Plaintiffs are seeking damages for conduct which is not anticompetitive or has been excluded from the case. This "disaggregation" argument is based upon the well-settled principle that an antitrust plaintiff is not entitled to recover for losses due to factors other than the defendant's anticompetitive acts. *Amerinet Inc. v. Xerox Corp.*, 972 F.2d 1483 (8th Cir.1992).

In order to place Brunswick's disaggregation argument in context, some explanation of Plaintiffs' damage model is necessary. Plaintiffs' expert, Dr. Robert Hall, provided the damage testimony for Plaintiffs at trial. Following his discussion of the alleged anticompetitive conduct, Dr. Hall testified that in order to quantify damages, he had to consider "what the market would have looked like without the conduct." Tr. at 1256. This analysis, commonly termed a "but for" analysis, required Dr. Hall to opine on the structure of the market and the market share of the participants in the absence of the conduct alleged to be anticompetitive. As a prelude to his damages testimony, Dr. Hall described the hypothetical "but for" market:

> These are my conclusions as an economist about how the market would be different. We'll be talking more about how I reached these conclusions, but the conclusions are: today Brunswick's share of sterndrive market is around 80 percent—75 to 80 percent. In this market without exclusionary acts, I believe that market share would be about 50 percent. It's not that Brunswick would not be in the market. Its role in the

> market would be smaller. Other rivals would be there, at least one other, taking up the other half the market there to give a good deal to compete against Brunswick.

Tr. at 1258. Thus, Dr. Hall essentially opined that in the "but for" market, Brunswick and at least one other engine manufacturer would each have approximately 50 percent of the relevant market.

Another key component to Dr. Hall's damage model is the economic model Dr. Hall used to derive his damage opinion, the Cournot model. In the Cournot model, competition is based on changing levels of output; each firm assumes that its rivals will produce a certain quantity of output and then selects its own profit-maximizing level of output. The Cournot model predicts that as the number of firms competing in a market increases, the relative concentration of the market decreases and the equilibrium price falls towards the competitive level.

Dr. Hall used the Cournot model to determine the average price in a competitive market for stern drive and inboard engines and then subtracted that price from an average actual price to determine an average overcharge per engine. One of the primary inputs into the Cournot model is market share. Consistent with Dr. Hall's opinion of the hypothetical market, if a market share of 50% is inserted into the formula, the model predicts no overcharge. However, as actual market share rises above 50%, the model predicts an overcharge, and the amount of the overcharge correspondingly increases the higher the share rises.

Brunswick contends that the damage model is fundamentally flawed for two reasons. First, according to Brunswick, events occurred in the actual market (the "real market") which were completely unrelated to any anti-competitive activity and resulted in market share gains for MerCruiser. Because Dr. Hall's model (the "hypothetical

market") does not specifically account for these market share gains, Brunswick contends that the model inherently penalizes Brunswick for market share gains from lawful activity. Second, Brunswick points out that Dr. Hall's initial damage opinion at trial was identical to the opinion from his pre-trial report, even though the Court, prior to trial, had excluded from the jury's consideration two alleged anticompetitive acts which formed the basis of the damage opinion in the report.

A.

With respect to Brunswick's first argument, evidence was introduced at trial that two "events" in the real market, unrelated to the conduct of Brunswick, accrued to Brunswick's benefit and most likely resulted in some degree of market share gain for MerCruiser. The first event, the Outboard Marine Corporation ("OMC") Cobra recall, received quite a bit of attention throughout the trial. OMC was one of Brunswick's principal competitors in the stern drive business in the 1980's and early 1990's. In 1986, OMC's stern drive engine, the "Cobra," developed a problem with a shift cable which controlled whether the drive unit was in or out of gear. The testimony at trial was that the problem lingered about for some time, and that OMC initially blamed its dealers for the problem. Finally in 1989, OMC was forced to issue a voluntary recall of all of its Cobra engines produced from 1986 through 1989. Dr. Hall agreed that the Cobra problem cost OMC engine sales and resulted in market share gains by MerCruiser.

The second event involved the alleged confusion and mismanagement relating to the joint venture between OMC and Volvo Penta of the Americas ("Volvo"). There was evidence that several boat manufacturers were skeptical of the joint venture in its initial stages and that both Volvo and OMC seemed to compete against each other, despite the joint venture relationship, to their own detriment.

And finally, several witnesses offered evidence of MerCruiser's alleged superior products, outstanding reputation, quality service, and extensive dealer network. No witness was able to empirically quantify any market share gains due to these traits, but Brunswick argued at trial that these characteristics benefitted MerCruiser in the form of increased sales.

The Court notes that the task Dr. Hall faced in analyzing this case was an enormous one. Notwithstanding the complex nature of the conduct at issue, Dr. Hall was required to construct a hypothetical market, a "but for" market, free of the restraints and conduct alleged to be anticompetitive. The difficulty of such a task has long been recognized by courts in antitrust cases because "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566, 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981).

Dr. Hall unequivocally testified that his 50/50 hypothetical market is a market in which *only* Brunswick's unlawful conduct has been removed. He also testified that he fully considered all of the characteristics of the relevant market before he reached his 50/50 conclusion, including the events which allegedly increased Brunswick's share.[3] And finally, Dr. Hall correctly noted that the creation of the "but for" market required consideration of certain market characteristics that could have prevailed in a more competitive market. Taking all of these factors into account, Dr. Hall opined that in the hypothetical market Brunswick would have fifty percent of the sales. He did not opine that Brunswick would exit the market altogether. Thus, inherent

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[3] The Court notes that there were substantial factual disputes at trial concerning the significance of these events that purportedly increased MerCruiser's market share.

in Dr. Hall's damage analysis is the notion that Brunswick sells 50% of all stern drive and inboard engines in the relevant market because it is a vigorous competitor with a quality product, a good reputation, and the ability to capitalize on its competitors shortcomings. Dr. Hall has not eliminated those variables from any equation, he has only placed them into a proper frame of reference in a hypothetical competitive market. Dr. Hall testified that he constructed a market in which *only* the unlawful conduct had been removed, and that was all he was required under the law to do.

As Plaintiffs correctly point out, the fundamental flaw in Brunswick's argument is that Brunswick uses the 50% benchmark as the starting point of the analysis and then implies that share gains from the Cobra problem or "quality products" or "superior service" must be added on top of that. In other words, Brunswick assumes that it would have 50% of the hypothetical market *by default*. But, as Dr. Hall testified at trial, that is an inappropriate way to approach his model. Those factors are necessary for Brunswick to reach 50% of the hypothetical market in the first place.

Dr. Hall recognized that his 50/50 prediction is not mathematically precise. He recognized that in a complex market certain events will cause market share to rise and fall. And contrary to Brunswick's assertions, he never testified that every "positive" balances out exactly with every "negative." Dr. Hall's 50/50 opinion is an average, an equilibrium point, for Brunswick's market share in the absence of the unlawful conduct, and the Court does not believe the model inappropriately incorporates lawful conduct into its analysis.

B.

Next, Brunswick argues that Dr. Hall's damage opinion is based upon certain alleged conduct which was excluded from

the jury's consideration prior to trial. Dr. Hall's expert report set forth an initial damage opinion based upon the conduct alleged to be unlawful. Prior to trial the Court excluded two instances of alleged unlawful conduct: that Brunswick caused Yamaha to exit the stern drive engine market and that Brunswick disseminated boat manufacturers' confidential information. Brunswick argues that Dr. Hall's damage opinion did not change following these rulings, so his damage opinion at trial necessarily incorporates lawful conduct.

With respect to this issue, Brunswick might have had a viable argument had it chosen to raise it. As it turned out, Brunswick did not ask a single question of Dr. Hall about the excluded incidents, and Plaintiffs were prevented by the Court's orders from raising them. Brunswick did not ask Dr. Hall whether his opinion should have changed because of the exclusion of the conduct from consideration. At oral argument on the instant motion, Plaintiffs' counsel did offer an opinion as to what Dr. Hall would have said had he been asked that question, but the Court believes that it would not be appropriate to speculate as to what Dr. Hall's testimony might have been. If Brunswick wanted to demonstrate this particular flaw in Dr. Hall's damage opinion, then it should have inquired about the issue on cross-examination. Because Brunswick did not do so, this issue is moot.[4]

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[4] Even if Brunswick had appropriately raised these issues with respect to Dr. Hall's damage opinion, it is unlikely that Dr. Hall's decision to use the same damage figure would be any cause for concern. Plaintiffs challenged a variety of unlawful conduct, some instances of which, understandably, were more serious than others. The two incidents at issue here were minor in comparison to the other conduct, and it highly [sic] unlikely that they would have impacted the damage calculation in any meaningful way.

IV.

At trial, Plaintiffs challenged three separate types of pricing programs used by Brunswick in the distribution of its stern drive engines: (1) market share discounts; (2) volume discounts; and (3) long-term discounts and contracts.

Prior to the beginning of each new model year, MerCruiser provides boat manufacturers (OEMs) with the upcoming model year's MerCruiser OEM Purchase Agreement (the "agreements"). These agreements provide the terms and conditions under which OEM's may purchase MerCruiser engines, including the discount schedules available on MerCruiser purchases. In any given year, several types of discounts may be available to OEMs. For example, in one year MerCruiser may offer market share, volume, purchase planning, cash, freight and long term discounts. Combined these discounts can reach approximately 15% off the list price.

Although they have recently been discontinued, MerCruiser provided various market share discounts from 1984 to 1997. The market share discounts allowed boat manufacturers and dealers to earn discounts if they purchased certain percentages of their total engine purchases from MerCruiser. The discounts were usually highest at an 80% market share although in later years the threshold was lowered to 70%. For example, the 1995 through 1997 model year program provided a 1% discount for a 60% share, a 2% discount for a 65% share, and a 3% discount for a 70% share. Tr. at 2474-75.

The volume discounts did not contain a market share component. The volume discounts were based upon the total volume of engines purchased in a given model year. In the 1995-1997 program the volume discounts ranged from 1% to 5% list price depending on the volume purchased. In 1990, the threshold level for the volume discounts was 15,000 units.

By the 1995-1997 model year program, the volume discount threshold had been reduced by 83% to 2,500 units.[5]

The long term discounts did contain market share provisions. Under the long term discounts OEMs would get an additional 1% to 2% discount if they would agree to purchase a certain market share (i.e., 80%) for a term of three years. Brunswick also entered into specific long term contracts with four boat manufacturers: Baja, Porter, Pro-Line and Fountain. These contracts were three to five years in duration and, in the case of Baja and Porter, contained some provisions extending beyond five years. Baja and Fountain's contracts obligated those companies to purchase 100% of their engines from Brunswick, while Porter was obligated to purchase 99%. Pro-line's contract contained a 50% market share threshold.

Although they were nominally termed "purchase agreements," none of the agreements embodying these discount programs expressly obligated the manufacturers or dealers to purchase engines. Rather, they provided that the OEMs and dealers would receive the discounts if their purchases reached the stated levels. Additionally, none of the agreements contained express provisions restricting the OEMs' or dealers' ability to deal with other engine suppliers.

Brunswick has advanced two closely related arguments in support of the discount pricing programs. First, Brunswick argues that prices under the discount programs were above cost, and are therefore legal *per se*. Second, Brunswick argues that the market share and other discount pricing programs cannot be found to be unlawfully exclusionary.[6]

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[5] At trial, Plaintiffs presented evidence that these drastic reductions were part of an anticompetitive scheme to break up large buying groups such as IBBI.

[6] Brunswick did not raise either of these arguments prior to trial.

A.

In support of its first argument, Brunswick relies heavily on the First Circuit case, *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir.1983). In *Barry Wright*, Grinnell's codefendant, Pacific, offered Grinnell deep discounts on mechanical "snubbers," shock absorbers used in nuclear power plants. Barry Wright, a competitor of Pacific, alleged that the discounts were anticompetitive because they were unreasonably low and were intended to drive Barry Wright out of business. On appeal, the First Circuit examined the existing case law to determine when a price cut should be viewed as "predatory" and condemned by the antitrust laws. The court rejected a number of approaches from other circuits and ruled that prices above incremental and average costs are *per se* lawful. The court also found that the contract was not unreasonably exclusionary even though it required Grinnell to purchase the majority of its expected requirements (approximately 86%) from Pacific.

Brunswick further cites *Henry v. Chloride*, 809 F.2d 1334 (8th Cir.1987), another predatory pricing case, wherein the Eighth Circuit cited *Barry Wright* for the proposition that "prices above average total cost are legal *per se*." *Id.* at 1346. Because there has never been an allegation of below cost pricing in the present case, Brunswick argues that Plaintiffs' claims with respect to the various discount programs are foreclosed.

The Court questions whether this principle from *Barry Wright* and *Henry* completely forecloses Plaintiffs' claims. Plaintiffs have never alleged predatory pricing by Brunswick, and the Court agrees with Plaintiffs that this case has never been about "low prices." To the contrary, Plaintiffs have alleged and attempted to prove that Brunswick charges anticompetitive *high* prices for its engines. Plaintiffs are seeking to recover an overcharge based upon those prices. In essence, Plaintiffs have maintained that Brunswick sets an

anticompetitive high price for its engines and then offers an attractive discount schedule designed to lock customers in to Brunswick purchases. Although one could attempt to argue that the discounts are merely functions of price, these discounts are not *solely* functions of price because they are tied to corresponding conditions based upon certain degrees of exclusivity.

Furthermore, at least one court has rejected the argument that *any* pricing practice that leads to above cost prices is *per se* lawful under the antitrust laws. *See LePage's Inc. v. 3M*, No. Civ.A. 97-3983, 1997 WL 734005 (E.D.Pa. Nov.14, 1997). In that case, the restraint at issue was product "bundling," where the defendant, 3M, offered discounts on several products purchased together, but the prices were not below cost. In a motion to dismiss, 3M cited the Supreme Court's decision in *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993), (as does Brunswick) in support of the position that above cost prices are legal *per se*. *Id.* at *8-9. However, in an earlier case, *SmithKline v. Eli Lilly & Co.*, 575 F.2d 1056 (3rd Cir.1978), the Third Circuit had found that a similar "bundling" program violated Section 2. The district court in *LePage's* rejected 3M's argument, ruling that the conduct at issue was similar enough to that found unlawful in *SmithKline* to overcome the motion to dismiss. *Id.* at *9-10. In the face of the obvious distinction that *Brooke Group* was a predatory pricing and price discrimination case, the court stated that it "could not conclude that *Brooke Group* supersedes *SmithKline* with respect to this case." *Id.* at *9.

Similarly, the district court in *SmithKline* specifically rejected a "safe harbor" argument somewhat identical to Brunswick's argument here. *SmithKline Corp. v. Eli Lilly & Co.*, 427 F.Supp. 1089 (E.D.Pa.1976). The district court's rationale is entirely applicable to the instant case, in spite of the slightly different factual context:

> *[A] monopolist does not receive immunity merely because it has priced the product in issue above its average cost.* For that immunity is lost when it uses a pricing scheme linking the monopolistic products (Keflin and Keflex) with another competitive product (Kefzol) to deter SmithKline from entering or effectively competing in the cephalosporin market. We should be ever mindful that the gravamen of this complaint and my holding are not that the *price* Lilly separately charges for Keflin or Keflex are unreasonable from an antitrust standpoint; the nub of this case is the *linkage of these latter products in a pricing scheme to deter competition in Kefzol*. . . .

SmithKline, 427 F.Supp. at 1128 (emphasis added). Thus, the district court recognized that it was not the price that was relevant, it was the "strings" attached to the price.[7] In the instant case, Plaintiffs are not challenging unreasonably low prices. They are challenging the "strings" attached to Brunswick's prices, i.e., the exclusivity provisions.

Notably, *SmithKline* and *LePage's* are not the only "bundling" cases which lend support to Plaintiffs' position here. In *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.*, 920 F.Supp. 455 (S.D.N.Y.1996), the

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[7] The Third Circuit affirmed the district court in *SmithKline*. The court's ruling is instructive:

> "In sum, the act of willful acquisition and maintenance of monopoly power was brought about by linking products on which Lilly faced no competition Keflin and Keflex with a competitive product, Kefzol. The result was to sell all three products on a non-competitive basis in what would have otherwise been a competitive market for Ancef and Kefzol. . . . Were it not for the Lilly's [pricing plan], the price, supply, and demand of Kefzol and Ancef would have been determined by the economic laws of a competitive market. The Revised CSP blatantly revised those economic laws and made Lilly a transgressor under § 2 of the Sherman Act."

SmithKline v. Eli Lilly & Co., 575 F.2d 1056, 1065 (3rd Cir.1978).

court undertook an extensive analysis of the above average variable cost issue with respect to "bundling" and stated:

> This analysis disposes of Abbott's contention that it is entitled to dismissal of the Section 2 claims because it is not even accused of pricing below average variable cost. While average variable cost is the controlling standard in this circuit in single product cases, . . . *Brooke Group* did not even address package pricing such as that involved here and thus cannot have decided the issue. For present purposes the controlling standard *serves only one purpose*—distinguishing in single product situations (a) *pricing* that constitutes competition on the merits from (b) *pricing* that may permit a monopolist or putative monopolist to get rid of its competitors and pave the way for an abuse of market power.

Id. at 467-68 (emphasis added)(footnote omitted). This quote lends support to Plaintiffs' position that the various incarnations of the "above cost" rule apply only to the price itself.

The Court believes that the proper application of *Brooke Group, Barry Wright*, and *Henry* to this case is that the "above cost" rule applies only to the price itself, and that those cases do not *per se* validate all above cost pricing programs which may be combined with additional restraints or otherwise structured in an anticompetitive manner.

B.

Brunswick next argues that its various market share discount programs can not, as a matter of law, constitute unlawful conduct in violation of Section 1 or 2 of the Sherman Act.

As described above, the market share discount programs required the boat manufacturers and dealers participating in the programs to purchase certain levels of their total engine

requirements (usually 70%—80%, and in the case of some dealer programs, 100%) in order to receive certain discounts. Plaintiffs uniformly testified that purchasing MerCruiser engines and fulfilling the market share requirements was their only viable economic option and that in order to remain in business they had to achieve the maximum discounts. At trial, Plaintiffs presented evidence that the market share programs excluded Brunswick's competitors from the relevant market which in turn allowed Brunswick to artificially inflate engine prices. In addition, Plaintiffs introduced substantial evidence demonstrating Brunswick's monopoly power. With a market share of approximately 75%—80%, the evidence reflected that Brunswick dominates the relevant market.

Plaintiffs' expert, Dr. Hall, testified that the various programs and contracts operated to tax boat manufacturers and dealers on their purchases of non-Brunswick engines. Dr. Hall described the operation of the programs and their resulting tax as follows:

> First of all, we should understand the economics of the transaction that occurs between Brunswick and a boatmaker. Both of them desire to buy and sell the engine, so that's part of the story, so part of what you see there is boatmaker purchases of engines from Brunswick. But something else is happening in these contracts that's very important to understand, and that is that Brunswick is buying from the purchaser a barrier to entry. It does that by putting provisions into the contract, the market share, quantity discount, those type of provisions that we'll talk about. In order to sustain that, Brunswick has to, basically, buy that from the boatmaker. That's part of the deal.
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> * * * *

The effect of these provisions is to give a substantial discount to a company that gives Brunswick a large fraction of its business. That's why they're called market share contracts. The market share being measured here is not the market as a whole, it's the share of that boatmaker's engine purchases that . . . is directed to Brunswick. The discounts are largest if a high share of the purchases come from Brunswick, and typically disappears below some level here (indicating), 60 percent. So, to start with the market share provision of the contract, it gives a 3 percent discount if more than 70 percent of engine purchases come from Brunswick; 2 percent between 65 and 69; 1 percent between 60 and 64; and below 60, no discount. The discount is taken away. Now, I'll go over this several times. But the tax comes in the following way: If a boatmaker decides to take some of its engine business elsewhere so that . . . for example, it drops below 70 percent, but it continues to purchase some engines, say 65 percent of its engines from Brunswick, it loses discount on the remaining engines. So you're losing something; business that's staying with Brunswick is no longer as well priced, its price is going up. That means, in effect, it's costly to buy those engines. You're sacrificing discounts by buying engines from another supplier. You lose the discount on the remaining engines. So as—if a company went several notches down here (indicating), it could lose all three percentage points and, yet, if it continued to buy engines, it would have to be paying a higher price for the Brunswick engines. So there's a tax, as a company, in this case, as a boatbuilder, that goes from the 70 percent level below the 60 percent level. As they make that transition from being more loyal to Brunswick to less loyal, they're paying a tax on the engines that they're still buying.

Tr. 1158-61.

Plaintiffs presented further evidence regarding the effects of these discount programs. Dr. Hall testified that in 1996, 38% of all stern drives and inboards were sold under the market share discount programs. Similarly, the evidence reflected that Brunswick's captive boat companies, Bayliner and Sea Ray, accounted for 40% of the stern drive and inboard sales in 1996. Thus, the foreclosure rate at the manufacturer level was estimated to be 78%. In addition, at the dealer level, approximately 25% of the total industry's stern drive and inboard shipments in 1996 were tied to the dealer market share agreements. Evidence was also introduced that Brunswick's current principal competitor, Volvo, has been unable to achieve minimum efficient scale because of the alleged unlawful programs and acquisitions.

Finally, Plaintiffs presented a substantial amount of evidence regarding the "two-tiered" effect of the discount programs. In the marine industry boat manufacturers must have a network of dealers willing to carry their boat lines. Because Brunswick utilized the discount programs at the boat manufacturer *and* dealer level, several boat manufacturers testified that even if they had wanted to support Volvo, they could not have switched because the incentivized dealers would refuse to purchase non-MerCruiser powered boat lines. In contrast to the 70% to 80% manufacturer programs, several of the dealer programs from 1992 to 1996 required that the dealer sell 100% MerCruiser engines.

Although Brunswick was acutely aware of the effects of the various programs, the industry's concerns apparently fell on deaf ears. Plaintiffs, along with other boat manufacturers, complained vehemently to Brunswick that the market share requirements were unfair, and that they effectively prevented boat manufacturers from supporting other engine manufacturers. In spite of this, Brunswick never withdrew the market share requirements and even sought to increase the market share requirement to 95% in the proposed 1994

"Industry Growth Program." Those efforts ultimately proved unsuccessful due to serious backlash from boat manufacturers. Notably, MerCruiser's Director of Marketing, Bob Gowens, wrote that the purpose of the initial version of the Industry Growth program was to put MerCruiser's customers in "golden handcuffs" and to "lock out" Volvo. *See* PX 239, 1323.

Brunswick's business documents are riddled with acknowledgments of the anticompetitive nature of these agreements. In one document, MerCruiser employee Mike Gyorog wrote that "MerCruiser's market share is being driven by OEM's pricing to dealers to achieve 80 percent market share commitment." PX1369A. The [illegible] inference from such a statement is that boat [illegible] were disadvantageously pricing non-MerCruiser [illegible] boats in order to achieve the market share requirements, and that this practice was "driving" MerCruiser's near-80% market share. Similarly, Barry Eller, MerCruiser's General Manager, acknowledged that the market share programs insulated MerCruiser from market share erosion:

> ***MerCruiser will incur the risk of market share loss as a result of eliminating the market-share related discounts form*** [sic] ***the OEM program.*** **Falling below 70% market share today has signific[illegible] minimum penalty for f[illegible] 3.2%, and as much [illegible] have an impact on [illegible]**

PX 1510A (emph[illegible] McKinsey & Company [illegible] a document titled "Final Prog[illegible] document, "Marine Power [i.e. Mercury Marine] has *meaningful barriers to entry* at sterndrive boat builders based upon volume rebates, share pricing, and long-term contract commitments." PX 1128A (emphasis added). Numerous other

Brunswick documents reflect the anticompetitive intent and effect of the various programs.

Brunswick seeks to avoid the substantial evidence described above on formalistic legal presumptions. According to Brunswick: (1) Plaintiffs' claims are appropriately described as exclusive dealing claims; (2) under exclusive dealing law, a contract may be found unlawful *only* if it *completely* prevents customers from dealing in the goods of a competitor (in other words, only if it is 100% exclusive); and (3) because the boat manufacturers and dealers in this case retained the ability to deal with Brunswick's competitors, then the agreements at issue cannot constitute exclusive dealing and cannot violate the Sherman Act. Brunswick further argues that even if the agreements can constitute exclusive dealing, they are non-binding, and thus their short "duration" mandates a finding that they are lawful.

Brunswick's arguments are incorrect as a matter of law and fact. After a ten-week jury trial, the record is replete with evidence that Brunswick's programs, in conjunction with the remainder of the allegedly anticompetitive conduct, effectively *required* Plaintiffs and other boat manufacturers to purchase *extremely* high percentages of their total engine purchases from Brunswick for terms as long as three to five years, and that the manufacturers in fact risked their economic survival by dealing with alternative suppliers. The record also reflects the anticompetitive effects of these agreements, specifically that they prevented MerCruiser's competitors from competing in the relevant market and allowed MerCruiser to artificially elevate engine prices in the relevant market. The fact that the contracts are "non-exclusive" on their face and allow *some* purchases from other suppliers is technically irrelevant, as the fundamental consideration is the objective reasonableness and overall economic effect of *the entirety* of Brunswick's conduct, including the agreements at issue. Although Plaintiffs

ostensibly retained the ability to deal with Brunswick's competitors, the overwhelming evidence was that this ability was tremendously restrained by the agreements, and that this restraint produced anticompetitive effects. In the Court's opinion, these agreements cannot be upheld *as a matter of law* merely because they were not 100% exclusive.[8]

The Court has found no existing case law addressing anything even close to the unique situation presented in this case. That is: (1) a defendant with monopoly power; (2) competing at two levels of distribution; (3) effectively requiring its downstream customers *at separate levels of distribution* (i.e., OEM's *and* dealers) to purchase extremely high percentages (70%-100%) of their requirements from the defendant; (4) in order to receive discounts, the receipt of which are the buyers' only viable economic option; and (5) resulting in the obvious exclusion of any significant competition in the relevant market, the artificial inflation of prices in that market, and the assessment of unreasonable taxes and penalties on non-complying buyers. The Court has no doubt that such practices are within the purview of the Sherman Act, regardless of their alleged non-exclusivity because they are the de facto equivalent of exclusive dealing.

The Supreme Court has specifically stated that antitrust cases must be resolved on their own unique facts:

> Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to

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[8] Plaintiffs raise a good point with respect to the 100% argument. At what point would courts draw the line if that was in fact the law? Could 99% contracts violate the Sherman Act? Apparently under Brunswick's theory they could not, regardless of the anticompetitive impact such contracts might have. Such a drastic example reinforces the notion that it is the manifest reasonableness and effect of a challenged restraint, not its conclusory label, that is relevant to a Sherman Act rule of reason analysis.

> resolve antitrust claims on a case-by-case basis, focusing on the "particular facts disclosed by the record."

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 466-67, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992), *citing Maple Flooring Manufacturers Ass'n v. United States*, 268 U.S. 563, 579, 45 S.Ct. 578, 69 L.Ed. 1093 (1925). Similarly, the Eighth Circuit has expressly found that conduct that does not meet the "traditional" requirements for a particular antitrust claim can still violate the Sherman Act if it shares the same anticompetitive effect. In *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, 772 F.2d 467 (8th Cir.1985), the court refused to dismiss a claim for unlawful tying, even though the conduct at issue clearly did not constitute a tying arrangement. In doing so the court stated:

> [T]he evil which is allegedly generated by the defendants' initiation fee arrangement is the same as that generated by traditional unlawful tying arrangements—competition in the market for one product is restrained due to the seller's exploitation of its control over another product. . . . Thus, even though a proper tying claim was not alleged in the Association's complaint, the factual allegations made in the complaint may support a conclusion that the defendants' initiation fee arrangement constitutes an unreasonable "restraint of trade," 15 U.S.C. § 1, in violation of the antitrust laws, *with the Association's tying arrangement serving only as an analogy for analyzing the lawfulness of the defendants' initiation fee arrangement.*

Id. at 474-75 (emphasis added). Thus, regardless of whether the conduct at issue fits perfectly within a previously determined category of unlawful conduct, the fundamental concern is whether the conduct, in light of its requisite effects, can reasonably be found to violate Sections 1 and 2 of the Sherman Act.

To prevail under Section 1 of the Sherman Act, Plaintiffs were required to prove the presence of agreements which unreasonably restrained trade. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988). Under Section 2 of the Sherman Act, Plaintiffs were required to demonstrate that Brunswick's pricing programs constituted exclusionary conduct in furtherance of a scheme to willfully acquire or maintain its monopoly power. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). Plaintiffs have presented a tremendous amount of proof on these elements, and the jury obviously found that Plaintiffs had satisfied their burdens. The Court has not found any rule of law that would mandate a reversal of those findings. Accordingly, Brunswick's motion for judgment as a matter of law with respect to the market share discount programs is denied.

V.

Brunswick next argues that Dr. Hall's methodology used to support Plaintiffs' liability claims and to calculate their damages fails to meet the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and FED. R. EVID. 702. Brunswick further argues that Dr. Hall's testimony cannot provide a "legally sufficient evidentiary basis" necessary to survive a motion for judgment as a matter of law.

Prior to trial the Court denied Brunswick's *Daubert*-related motion, and the Court will do so again here. The Supreme Court could not have stressed more forcefully in *Daubert* that the focus of Rule 702 is solely on technique and methodology, not the conclusions that they generate. *Daubert*, 509 U.S. at 595, 113 S.Ct. 2786. Plaintiffs have amply demonstrated the soundness of the Cournot model as a fundamental, time-tested economic tool that has been widely accepted for years by reputable economists. Indeed, the

Cournot model provides the theoretical underpinnings for the Department of Justice's Horizontal Merger Guidelines and the widely used Herfindahl-Hirschman Index (the "HHI"). Noted economist Dr. Carl Shapiro has described the Cournot model as follows:

> Another attractive feature of the Cournot equilibrium is that it allows us to draw some direct relationships between market structure and performance . . . Thus, Cournot's theory provides an intuitively reasonable prediction of the relationship between equilibrium market structure (as measured by market shares), and performances. . . Amazingly, this relationship can be summarized using a simple concentration index, the Herfindahl Index, in conjunction with the elasticity of industry demand.

DR. CARL SHAPIRO, HANDBOOK OF INDUSTRIAL ORGANIZATION 342 (1984). Brunswick makes no attempt to argue that the Cournot model is an inappropriate method of predicting equilibrium price formation in oligopolistic markets. And once one accepts the proposition that the Cournot model can be used to predict competitive price formation, each of Brunswick's criticisms are reduced to complaints about how Dr. Hall applied the Cournot model to the facts of this case. Accordingly, the Court finds that neither *Daubert* nor the Federal Rules of Evidence render Dr. Hall's opinions inadmissible.

But even if *Daubert* and Rule 702 did apply to these *factual* criticisms of Dr. Hall's opinions, those opinions would still be entirely admissible. Brunswick more or less attacks every opinion Dr. Hall rendered in this case, arguing that Dr. Hall's 50/50 opinion is legally impermissible, and that every other opinion flowing from the 50/50 assumption is therefore fundamentally flawed. According to Brunswick, the 50/50 theory is "repugnant to the procompetitive purposes of the antitrust laws."

In its memorandum, Brunswick seems to argue that Dr. Hall has opined that every competitive market results in a 50/50 division. In fact, many of Brunswick's criticisms are in the same vein: Brunswick attempts to paint Dr. Hall's conclusions as absolutes *in every market*. But Dr. Hall could not have testified more clearly that his opinions in this case are based on a specific analysis of *this* market and the *specific* conduct that has been occurring in *this* market. Dr. Hall also clearly testified that the 50/50 conclusion was not mathematically precise. He further described how the hypothetical market could have been even more competitive, resulting in even lower equilibrium prices.

Beyond that, it is hard for the Court to see what is so "repugnant" about the 50/50 conclusion. If Dr. Hall had altogether eliminated Brunswick from the hypothetical market, there would be serious cause for concern. But Dr. Hall chose a hypothetical market division that is, with all things considered, relatively conservative and based upon actual facts in the record. Brunswick's protestations to the contrary are unfounded and, not surprisingly, implicate factual disputes that were for the jury to decide.

Brunswick's arguments with respect to the remainder of Dr. Hall's opinions suffer from the same infirmities as described above. In each instance Brunswick argues that an opinion is "completely unfounded" or "speculative" or "bogus," even though every one of the opinions was carefully explained by Dr. Hall, was reasonable under the circumstances, and has abundant support in the factual record. Furthermore, as explained in Section III., *supra*, Dr. Hall's opinions did in fact take into account the events which purportedly increased Brunswick's market share.

In sum, the Court finds no defects in Dr. Hall's methodology *or* the application of his methodology to the facts of this case, and his expert testimony is plainly sufficient to support the jury's verdicts.

VI.

Brunswick next asserts that it is entitled to judgment as a matter of law on the present value calculation incorporated into Dr. Hall's damage analysis. First, Brunswick argues that such a recovery is precluded because present value and prejudgment interest are synonymous under the law. Second, Brunswick argues that Dr. Hall's present value calculation is in actuality a prejudgment interest calculation and should therefore be precluded.

It is well settled that prejudgment interest is not recoverable in an antitrust case. *See Fishman v. Estate of Wirtz*, 807 F.2d 520, 561-62 (7th Cir.1986). However, several courts have upheld awards compensating for the present value of the injury, and the Eighth Circuit expressly allows for present value calculations in antitrust cases. *See H.J. Inc. v. International Tel. and Tel. Corp.*, 867 F.2d 1531, 1549 (8th Cir.1989). In *H.J.*, the court ruled that the appropriate measure of damages "is the present value of profits lost" as a result of the unlawful conduct. *Id.*; *see also Multiflex Inc. v. Samuel Moore*, 709 F.2d 980 (5th Cir.1983)(recovery allowed for damages that included "what the asserted lost profits would have earned in an open investment market," given that the claim was "based on an economic theory and not on a claim to statutory or common law prejudgment interest."); *Lovett v. General Motors Corp.*, 769 F.Supp. 1506, 1521-22 (D.Minn.1991)(allowing a present value calculation), *rev'd on other grounds*, 998 F.2d 575 (8th Cir.1993).

Brunswick argues that present value calculations are not recoverable because they are identical in function to prejudgment interest. Brunswick cites a non-antitrust case, *Library of Congress v. Shaw*, 478 U.S. 310, 321, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986) where the Supreme Court ruled that a plaintiff in a suit against the government may not recover for prejudgment interest absent "an express waiver of

sovereign immunity from an award of interest." *Id.* at 311, 106 S.Ct. 2957. The Court in *Library of Congress* rejected the plaintiffs' argument that the no-interest rule did not preclude an award for delay in recovery. The Court stated that "[i]nterest and a delay factor share an identical function. They are designed to compensate for the belated receipt of money. . . ." *Id.* at 322, 106 S.Ct. 2957. Brunswick cites several unpublished cases that have applied *Library of Congress* in the antitrust context and precluded present value damage calculations.

The Court finds that *Library of Congress* does not preclude a present value damages calculation in this context. Plaintiffs are not making any type of claim to statutory or common law prejudgment interest. Rather, they are seeking to recover the present value of the overcharge. Given that *H.J.* (which was decided three years after *Library of Congress*) and other persuasive authority specifically allow for such a recovery, the Court finds that such an award would be appropriate.

The Court must still resolve the issue as to whether Dr. Hall's present value calculation is in effect a prejudgment interest calculation that would be precluded. Brunswick points to Dr. Hall's initial expert report where he stated: "Plaintiffs are entitled to interest on these damages from the time the damages were incurred until the time of trial. I calculated this interest as the cost of debt that Brunswick faces." Prelim. Rep. of Dr. Robert Hall at 46. Brunswick moved *in limine* to preclude this portion of Dr. Hall's damage calculation, and Plaintiffs argued in response that although Dr. Hall called the calculation "interest" in his report, he actually was describing a calculation for present value. Because it was unclear at the time how Dr. Hall made his calculation, the Court reserved ruling on that portion of the motion, finding that the true nature of the calculation would have to be determined from his trial testimony.

Dr. Hall's testimony at trial demonstrated that his calculation was actually one for present value. The following exchange occurred between Plaintiffs' counsel and Dr. Hall:

A. Now, there is one more thing that needs to be done in the measurement of what this means in terms of how–what amount of compensation today would be necessary to make up for overcharges that occurred in the past. Because to make up today for a loss that occurred in the past—loss being the overcharge here—you have to adjust for the time value of money and we do that through the discount rate.

(Objection)

Q. Dr. Hall, if you will continue with your answer, which I think was directed at how you went about calculating the time value of damages, time value of that money.

A. Certainly. Another word for the adjustment that I'm applying here is what economists call present value. This 202, say, for 1986 says that it takes $2.02 to compensate someone today for a dollar that they lost in 1986. Or what we would say is the present value today of a 1986 dollar is $2.02. That's how we adjust for the fact of timing matters. If we look into the future, as we will, it goes the other way. The amount of compensation today for a future dollar lost is less than a dollar because you would rather have the dollar now than later. That's the time value of money expressed as the present value. So the overcharge in 1986 of $925,000.00 then to bring to present value is multiplied by 2.02 and that gives the $1.8 million for 1986. Similarly, all the way across. The same calculation for each year through 1993.

Brunswick's expert, Dr. Richard Rapp, challenged Dr. Hall's description of the calculations as present value calculations. Tr. at 5365-67. However, Dr. Rapp's testimony did not persuade the Court that Dr. Hall's calculations were bare interest calculations. Accordingly, the Court finds that Dr. Hall appropriately adjusted his damage calculations to reflect the present value of the overcharges. Brunswick's motion for judgment as a matter of law with respect to this issue is denied.

VII.

Brunswick next argues that two Plaintiffs did not prove at trial that they acquired their claims from their corporate predecessors. Plaintiffs filed this lawsuit on December 7, 1995. In 1991 Mirage Marine transferred some of its assets to Mirage Holdings. In 1996, following the commencement of the lawsuit, Mirage Holdings transferred its assets to the named Plaintiff in this action, Mirage Manufacturing, LLC. Similarly, in 1993 WTYS No. 4 acquired the assets of Thompson Boat Company out of bankruptcy. Then in 1996, WTYS No. 4 sold its assets to the current Plaintiff, Thompson Marine Products.

Brunswick argues that Mirage and Thompson cannot recover on any of their claims because the [sic] did not prove at trial that they "own" their claims. Brunswick characterizes the argument as follows:

> Plaintiffs Mirage Manufacturing, LLC ("Mirage") and Thompson Marine Products, Inc. ("Thompson") offered no *evidence* that they acquired a cause of action from their predecessors. Neither is entitled to recover damages for claims that they failed to demonstrate that they own. And, at trial, they did not demonstrate anything at all about the subject. Simply put, this is a failure of proof.

Brunswick's Mem. dated June 15, 1998 at 32 (emphasis in original); *see also*, Brunswick's Mem. dated May 13, 1998 at 115-16 ("But neither offered any proof to the jury that it acquired its predecessor's cause of action against Brunswick. . . . As a matter of law, Brunswick is entitled to judgment on those damage claims.").

This argument is somewhat puzzling, because there is no substantive or procedural requirement that a party must take the stand and testify that it "owns" the claims it is pursuing. In fact, such a notion is plainly contradicted by the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 17(a) and 25(c). Apparently equally confused, Plaintiffs initially responded to the argument as if Brunswick had asserted a lack of standing defense. However, an argument of this nature has nothing to do with standing. Instead, the issue falls squarely within the "real party in interest" doctrine, a concept directly addressed by Rule 17 of the Federal Rules of Civil Procedure. *See Tate v. Snap-On Tools Corp.*, No. 90 C 4436, 1997 WL 106275 (N.D.Ill. Feb.11, 1997)(distinguishing standing from the real party in interest doctrine); *see also* 6A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE, § 1542 (2d ed.1990). Accordingly, the Court will construe Brunswick's "failure of proof" argument as a real party in interest objection under Rule 17.

Federal Rule of Civil Procedure 17(a) specifies that an action "shall be prosecuted in the name of the real party in interest." In other words, the action must be brought by the person entitled under the governing substantive law to enforce the asserted right. The purpose of the rule is to prevent multiple or conflicting lawsuits by persons such as assignees, executors, or third-party beneficiaries, who would not be bound by *res judicata* principles. 6A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE, § 1543 (2d ed.1986). But Rule 17 specifically requires that before an

action can be dismissed at a defendant's behest, the court must allow a reasonable time for ratification by, or joinder of, the real party in interest. Thus, the Eighth Circuit Court of Appeals has consistently held that Rule 17 objections must be timely raised:

> Because the requirements in Rule 17(a) are for the benefit of the Defendant, we have held that an objection on real party in interest grounds "should be raised with reasonable promptness in the trial court proceedings. If not raised in a timely fashion, the general rule is that the objection is deemed waived."

United HealthCare Corp. v. American Trade Ins. Co., 88 F.3d 563, 569 (8th Cir.1996)(*quoting Sun Refining & Marketing Co. v. Goldstein Oil Co.*, 801 F.2d 343, 345 (8th Cir.1986)). In *United HealthCare*, the court found that an objection raised one week prior to trial was untimely. Other courts have routinely rejected untimely objections as having been waived. *See, e.g., Allegheny Int'l, Inc. v. Allegheny Ludlum Steel Corp.*, 40 F.3d 1416, 1431 (3rd Cir.1994)(buyer of corporation waived right to require successor in interest of seller to be substituted as party plaintiff, by not raising objection until it made a motion for summary judgment at trial); *Gogolin & Stelter v. Karn's Auto Imports Inc.*, 886 F.2d 100, 102-03 (5th Cir.1989)(holding that defendant waived real party in interest defense by "untimely assertion," where defendant raised it for the first time in a motion for directed verdict); *Hefley v. Jones*, 687 F.2d 1383, 1388 (10th Cir.1982)(objection raised sixteen days prior to trial was untimely).

In the present case, Brunswick did not raise its real party in interest objection until it filed its motion for judgment as a matter of law. Under well-settled authority Brunswick raised the issue in an untimely manner, and the issue is waived.

Because some of the transfers at issue here occurred after the commencement of this lawsuit, consideration of Rule 17 does not completely resolve the matter. Rule 17 applies only to transfers prior to the commencement of the lawsuit. *ELCA Enterprises, Inc. v. Sisco Equip. Rental & Sales, Inc.*, 53 F.3d 186 (8th Cir.1995). When a transfer occurs during the pendency of litigation, Rule 25(c) governs. Rule 25(c) states that "in case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." FED. R. CIV. P. 25(c). The rule is "designed to allow an action to continue unabated when an interest in a lawsuit changes hands, rather than requiring the initiation of an entirely new lawsuit." *ELCA Enterprises, Inc.*, 53 F.3d at 191. Whether to substitute or join a transferee under Rule 25(c) is a discretionary determination by the trial court. "The court, if it sees fit, may allow the transferee to be substituted for the transferor. It is also free, if it wishes, to retain the transferor as a party and to order that the transferee be made an additional party." 7C WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE, § 1958 (2d ed.1986).

Here, two transfers of interest occurred during the pendency of the litigation. On April 18, 1996, Plaintiff Thompson Marine Products foreclosed on the assets of WTYS No. 4, Inc. On October 1, 1996, Mirage Holdings Inc. was sold to Plaintiff Mirage Manufacturing, LLC. Plaintiffs filed a motion for leave to file a third amended complaint on March 5, 1997. In the memorandum in support of the motion, Plaintiffs described the two corporate transfers and requested leave to substitute the new corporate entities. Plaintiffs specifically averred that the new corporate entities received the rights to any proceeds received in connection with this lawsuit. On March 17, 1997, Brunswick responded to

Plaintiffs' motion to amend, stating that it had no objection to the party modifications proposed by Plaintiffs.

Although Plaintiffs filed their motion to amend pursuant to Rule 15, the import of the motion was clear: Plaintiffs intended to substitute two corporate successors in interest for the then existing Plaintiffs, WTYS No. 4 and Mirage Holdings. Thus, the fact that the motion did not implicate Rule 25(c) on its face is irrelevant. By failing to object to the substitution, Brunswick waived any objection that it may have had. And even if the objection was not waived at the time of the motion, Brunswick was still obligated to raise any "improper substitution" issue in a timely manner to allow the Court to properly address it and to allow Plaintiffs to cure any possible defects. In sum, as with the Rule 17(a) objection, Brunswick has simply waited too long to inject this issue into this litigation. If Brunswick did not believe that Thompson Marine Products and Mirage Marine Manufacturing LLC were proper Plaintiffs, it should have raise [sic] the issue at an appropriate time. Similarly, if Brunswick believed that additional parties should have been joined to allow for complete relief, that issue should have been timely raised as well.

The Court believes the foregoing makes it clear that Plaintiffs Mirage and Thompson were not obligated to "prove up" their corporate history as a predicate to recovering on these claims. To the contrary, it was incumbent upon Brunswick, not the Plaintiffs, to raise issues of "ownership" of claims and necessary parties in a timely manner under the Federal Rules of Civil Procedure. Because Brunswick failed to do so, any objections it may have had in that regard are waived.

VIII.

In its final argument, Brunswick merely repeats the basic thrust of the argument above regarding Mirage and

Thompson. Brunswick argues that "with respect to each Plaintiff who failed to appear and testify at trial, the record is devoid of any evidence that these Plaintiffs are in fact the Plaintiffs specified in the Complaint." Brunswick's Supp. Mem. dated May 15, 1998. Of course, as explained above, none of the Plaintiffs were obligated to testify to "identify" themselves or demonstrate that they "own" their claims. This argument is rejected.

Brunswick also argues that for those Plaintiffs who did not testify, there is no evidence in the record that they in fact purchased engines from Brunswick. Brunswick argues that the engine purchase data introduced through Dr. Hall is insufficient to establish this point.

This argument in simply incorrect. The engine purchase information introduced through Dr. Hall was based upon data supplied by Brunswick. As such, it was competent evidence regarding engine purchases that the jury was entitled to consider. Furthermore, it is significant that Brunswick never contested that the engine purchases were made by the Plaintiffs. In fact, in Brunswick's Answer to Plaintiffs' Fourth Amended Complaint, Brunswick admitted that each Plaintiff purchases stern drive engines from Brunswick. Brunswick never even objected to the introduction of exhibits through Dr. Hall attempting to establish the engine purchase information. In sum, there is substantial evidence in the record regarding all of the Plaintiffs' engine purchases, and the Plaintiffs were not obligated to individually appear and offer that testimony.

IX.

In its motion, Brunswick has raised several additional grounds for judgment as a matter of law. The Court has carefully considered these remaining issues and finds that they are uniformly lacking in merit. Several of these arguments clearly raise questions of fact that are not properly

considered in a motion for judgment as a matter of law. Others ask the Court to completely disregard established authority as well as the voluminous evidence produced by the Plaintiffs in this case. The Court will summarily address these issues.

First, Plaintiffs presented substantial evidence to support the jury's verdict defining the relevant product market as the market for the sale of stern drive and inboard marine engines. Second, the jury's implicit finding that Brunswick possessed monopoly power in the relevant market is supported by substantial evidence and applicable authority. Third, the statute of limitations clearly does not act as a bar to Plaintiffs' claims under Section 7 of the Clayton Act. Fourth, Plaintiffs unquestionably have standing to recover damages based on Brunswick's anticompetitive acquisitions. And finally, the jury's finding that Brunswick's multiple acquisitions, considered collectively, violated Section 7 of the Clayton Act is fully supported by the evidence and applicable authority.

X.

Brunswick has also filed a motion for a new trial raising many of the same issues in its motion for judgment as a matter of law. The Court may grant a new trial on the basis that the verdict is against the weight of the evidence, if failing to do so would result in a miscarriage of justice. *Shaffer v. Wilkes*, 65 F.3d 115, 117 (8th Cir.1995) (*quoting White v. Pence*, 961 F.2d 776, 780 (8th Cir.1992)). "In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence—it can 'weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict'." *White*, 961 F.2d at 780 (*quoting Ryan v. McDonough Power Equip.*, 734 F.2d 385, 387 (8th Cir.1984)). The Court, however, may not "reweigh the evidence and set aside the jury verdict merely because the

jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *White*, 961 F.2d at 780 (quotations omitted).

The discussions in sections III, IV, V, and IX, *supra*, are particularly relevant to the initial issues raised in Brunswick's motion, and the Court will not repeat those discussions here. The Court finds that the jury's verdicts with respect to Plaintiffs' claims under Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act are not against the great weight of the evidence, and do not constitute a miscarriage of justice.

Brunswick argues that it is entitled to a new trial because the damages awarded by the jury were grossly excessive. However, the bulk of Brunswick's argument is directed to the same criticisms of Dr. Hall's opinions that the Court has rejected above. Brunswick also argues that if it had charged Dr. Hall's competitive price for engines, then it would have lost money on the sale of those engines. However, Dr. Hall offered a reasonable explanation for why that was an incorrect argument, and the jury was well within its province to reject the testimony of Dr. Rapp.

Brunswick also argues that it is entitled to a new trial based upon several evidentiary rulings. The Court finds that the admission of Dr. Hall's testimony, including the testimony regarding the present value of Plaintiffs' damages, was in no way unfairly prejudicial and does not provide a basis for a new trial. Furthermore, as explained in Sections VII and VIII, *supra*, all of the Plaintiffs presented competent, substantive evidence to demonstrate the elements of their claims, and they were in no way obligated to individually appear to testify that they "owned" their claims or to offer testimony regarding engine purchases.

The McKinsey documents were admitted by the Court after thorough consideration of the arguments and authority cited

in Plaintiffs' Memorandum in Opposition to Defendant Brunswick Corporation's Motion in Limine (McKinsey & Company Documents) dated March 16, 1998. The McKinsey documents were relevant and admissible under multiple grounds, and Brunswick suffered no unfair prejudice from their admission.

The Court finds no error in the admission of the FTC Stipulation, which was appropriately admitted under 801(d)(2) and was not unfairly prejudicial. Brunswick's arguments as to the irrelevance of the FTC Stipulation are completely contradicted by the trial testimony of former Brunswick CEO Jack Reichert, who testified that there was actually *more* competition between outboards and stern drives in 1976. Tr. 4727-29. Furthermore, even if the FTC stipulation was improperly admitted (which it was not), it could only constitute harmless error. The amount of evidence in this case demonstrating that outboard engines and stern drive engines are in separate product markets was overwhelming.

The Court's decision to exclude the expert testimony of Stephen Humphries was fully explained in the Court's Order of May 20, 1998, and Brunswick makes no persuasive argument suggesting that the Order was erroneous. A party simply cannot wait until its opponent rests, and then seek to vastly expand the subject matter of expert testimony to areas that had never been properly disclosed in accordance with firm disclosure deadlines. Furthermore, it makes no difference that Humphries received some data after the disclosure deadline of March 16, 1998. The trial of this matter commenced on April 13, 1998, and Brunswick had ample opportunity to file a timely request to supplement.

Brunswick objects to the Court's verdict form, basically repeating its disaggregation argument addressed in Section III, *supra*. Because there is not a disaggregation problem, this issue does not warrant a new trial. Brunswick also argues that certain interrogatories should have been included in the

verdict. The submission and form of interrogatories to the jury are matters within the sound discretion of the trial court. *E.I. du Pont de Nemours & Co. v. Berkley and Co.*, 620 F.2d 1247, 1271 (8th Cir.1980). The proposed interrogatories were, quite simply, unnecessary and misleading, and the Court was justified in omitting them.

Brunswick further argues that the Court's instructions to the jury contained prejudicial errors and omissions. A district court's decision to reject a proffered jury instruction is improper only if when viewed in their entirety, the jury instructions contain an error or errors that affect the substantial rights of the parties. *Hastings v. Boston Mut. Life Ins. Co.*, 975 F.2d 506, 510 (8th Cir.1992). "[T]he district court has discretion in the style and wording of jury instructions so long as the charge as a whole fairly and adequately states the law." *Beckman v. Mayo Found.*, 804 F.2d 435, 438 (8th Cir.1986). Furthermore, "[where] the charge to the jury correctly sets forth the law, a lack of perfect clarity will not render the charge erroneous." *Roth v. Black & Decker, U.S., Inc.*, 737 F.2d 779, 783 (8th Cir.1984).

The Court finds that the jury was properly instructed on the definition of monopoly power, as the instruction was in full accord with established Supreme Court and Eighth Circuit precedent. Brunswick's argument with respect to Instruction No. 17 has no merit. First, the instruction itself is not an instruction on the law because it only recites several categories of conduct which Plaintiffs maintained were anticompetitive. Furthermore, the instructions as a whole fairly and adequately stated the law.

XI.

In accordance with the above, Defendant Brunswick Corporation's Renewed Motion for Judgment as a Matter of Law (Docket # 1239) and separate Motion for a New Trial (Docket # 1240) are hereby DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3732/4O42EALR

CONCORD BOAT CORPORATION, *et al.*,
Appellees-Cross-Appellants,

v.

BRUNSWICK CORPORATION,
A DELWARE CORPORATION, *et al.*,
Appellant-Cross-Appellee.

June 13, 2000

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Richard S. Arnold took no part in the consideration or decision of this case.

(5128-010199)

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

FEDERAL STATUTES

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch. 647, § 1, 26 Stat. 209; Aug. 17, 1937, ch. 690, title VIII, 50 Stat. 693; July 7, 1955, ch. 281, 69 Stat. 282; Dec. 21, 1974, Pub. L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub. L. 94-145, § 2, 89 Stat. 801; Nov. 16, 1990, Pub. L. 101-588, § 4(a), 104 Stat. 2880.)

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch. 647, § 2, 26 Stat. 209; July 7, 1955, ch. 281, 69 Stat. 282; Dec. 21, 1974, Pub. L. 93-528, § 3, 88 Stat. 1708; Nov. 16, 1990, Pub. L. 101-588, § 4(b), 104 Stat. 2880.)

15 U.S.C. § 15b. Limitation of actions

Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

(Oct. 15, 1914, ch. 323, § 4B, as added July 7, 1955, ch. 283, § 1, 69 Stat. 283; amended Sept. 30, 1976, Pub. L. 94-435, title III, § 302(1), 90 Stat. 1396.)

15 U.S.C. § 18. Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize

or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Communications Commission, Federal Power Commission, Surface Transportation Board, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Board, or Secretary.

(Oct. 15, 1914, ch. 323, § 7, 38 Stat. 731; Dec. 29, 1950, ch. 1184, 64 Stat. 1125; Sept. 12, 1980, Pub. L. 96-349, § 6(a), 94 Stat. 1157; Oct. 4, 1984, Pub. L. 98-443, § 9(*l*), 98 Stat. 1708; Dec. 29, 1995, Pub. L. 104-88, title III, § 318(1), 109 Stat. 949.)